THE

NEGOTIABLE INSTRUMENTS LAW

OF

PENNSYLVANIA.

FROM THE DRAFT PREPARED FOR THE COMMISSIONERS ON UNIFORMITY OF LAWS, AND ENACTED IN NEW YORK, MASSACHUSETTS, RHODE ISLAND, CONNECTICUT, PENNSYLVANIA, DISTRICT OF COLUMBIA, MARYLAND, VIRGINIA, NORTH CAROLINA, TENNESSEE, FLORIDA, WISCONSIN, NORTH DAKOTA, COLORADO, UTAH, OREGON AND WASHINGTON.

THE FULL TEXT OF THE LAW AS ENACTED, WITH COPIOUS ANNOTATIONS.

BY

JOHN J. CRAWFORD, III

Of the New York Bar,

BY WHOM THE STATUTE WAS DRAWN.

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PREFACE.

In 1895 the Conference of Commissioners on Uniformity of Laws, which met that year in Detroit, instructed the Committee on Commercial Law to have prepared a codification of the law relating to bills and notes. The matter was referred to a sub-committee consisting of Lyman D. Brewster, of Connecticut, Henry C. Willcox, of New York, and Frank Bergen, of New Jersey; and I was employed by the sub-committee to draw the proposed law. When completed, the draft, with my notes, was submitted to the sub-committee, who printed it and sent copies to each member of the conference, and also to many prominent lawyers and law professors, and to several English judges and lawyers, with an invitation for suggestions and criticisms. The draft was submitted to the conference, which met at Saratoga in August, 1896; and the commissioners who were in attendance, being twenty-seven in all, and representing fourteen different States, went over it section by section, and made some amendments therein, most of which were such changes in the existing law as I had not felt at liberty to incorporate into the original draft. The draft as thus amended was adopted by the conference; and was afterwards approved by the American Bar Association, the American Bankers' Association, and by many State bar associations, among them that of Pennsylvania. The law has been enacted in New York, Massachusetts, Connecticut, Rhode Island, Pennsylvania, Maryland, Virginia, North Carolina, Tennessee, Florida, Wisconsin, North Dakota, Colorado, Utah, Oregon, and Washington, and has also been adopted by Congress as the law of the District of Columbia. In most

instances the law has been passed in the form proposed by the Commissioners on Uniformity of Laws; but in several States a few minor changes have been made. These are indicated in the notes. I have also endeavored to point out the changes made by the law in the different States and have added to the notes citations to the decisions in all the States where the statute is now in force. It is somewhat notable that so few cases have arisen under the Act. The reported cases number only about a half dozen in all; and in most of these the court was required only to apply the act, and not to construe it. Perhaps nothing could better demonstrate that the practical working of the law has been satisfactory.

The text as printed in this edition is that of the Pennsylvania statute. This is precisely the same as that published by the Commissioners on Uniformity of Laws, except for several slight verbal changes, and a few omissions and inaccuracies caused by errors in engrossing. The section headings, however, do not appear in the Pennsylvania statute; they are found only in the New York Act. But as they are fuller and more complete than the marginal notations of the Pennsylvania enactment, they have been retained instead of the latter.

JOHN J. CRAWFORD.

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Laws of Pennsylvania, 1901, No. 162.

Sections 1- 23. Form and interpretation of negotiable instruments.
24- 29. Consideration.
30- 50. Negotiation.
51- 59. Rights of holder.
60- 69. Liabilities of parties.
70- 88. Presentment for payment.
89-118. Notice of dishonor.
119-125. Discharge of negotiable instruments.
126-131. Bills of exchange; form and interpretation.
132-142. Acceptance.
143-151. Presentment for acceptance.
152-160. Protest.
161-170. Acceptance for honor.
171-177. Payment for honor.
178-183. Bills in a set.
184-189. Promissory notes and checks.
190-198. General provisions.

CHAPTER I.

NEGOTIABLE INSTRUMENTS IN GENERAL.

ARTICLE I.*

Form of† Interpretation.

Section 1. Form of negotiable instrument.
2. Certainty as to sum; what constitutes.
3. When promise is unconditional.
4. Determinable future time; what constitutes.
5. Additional provisions not affecting negotiability.
6. Omissions; seal; particular money.
7. When payable on demand.
8. When payable to order.
9. When payable to bearer.
10. Terms when sufficient.
11. Date, presumption as to.
12. Ante-dated and post-dated.
13. When date may be inserted.
14. Blanks, when may be filled.
15. Incomplete instrument not delivered.
16. Delivery; when effectual; when presumed.
17. Construction where instrument is ambiguous.
18. Liability of person signing in trade or assumed name.
19. Signature by agent; authority; how shown.
20. Liability of person signing as agent, et cetera.
21. Signature by procuration; effect of.
22. Effect of indorsement by infant or corporation.
23. Forged signature; effect of.

* The numbers of the sections of this article in States other than Pennsylvania are as follows: Colorado, Connecticut, District of Columbia, Florida, Massachusetts, North Carolina, North Dakota, Oregon, Tennessee, Utah, Virginia, and Washington, 1-23; New York, 20-42; Maryland, 20-42; Rhode Island, 9-31; Wisconsin, 1675-1 to 1675-23.

†Error in engrossing for "and."

§ 1. **Form of negotiable instrument.**—Be it enacted, etc.: That an instrument to be negotiable must conform to the following requirements:

1. It must be in writing (*a*) and signed by the maker or drawer.

2. Must contain an unconditional promise (*b*) or order to pay a sum certain in money (*c*);

3. Must be payable on demand (*d*), or at a fixed or determinable future time (*e*);

4. Must be payable to order (*f*) or to bearer (*g*); and

5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty (*h*).

(*a*) The writing may be in pencil. Brown *v.* Butchers' Bank, 6 Hill, 443.

(*b*) See section 3.

(*c*) This is the rule of the law merchant, and the rule which prevails in most of the States. In some States—as, for example, in Iowa and Georgia—certain instruments are declared by statute to be negotiable, though they provide that payment is to be made in goods or merchandise. See also section 6, subdivision 5. In New York warehouse receipts issued by certain corporations are declared to be negotiable. See Hanover Nat. Bank *v.* American Dock and Trust Co., 148 N. Y. 612; Corn Exchange Bank *v.* Same, 149 N. Y. 174. The act does not repeal these statutes.

(*d*) See section 7.

(*e*) See section 4.

(*f*) See section 8. The North Carolina Act reads: "Must be payable to the order of a specified person or bearer." The words "specified person" are surplusage, since by section 8 this is declared to be the effect of the term "order."

(*g*) Yingling *v.* Kohlhass, 18 Md. 148; Curtis *v.* Hazen, 56 Conn. 146. If the instrument is payable to a particular person, and not to his order or to bearer, it is not negotiable. Backus *v.* Danforth, 10 Conn. 297. As to bonds payable to bearer and coupons, see Carr. *v.* Leferre, 27 Pa. St. 413; County of Beaver *v.* Armstrong, 44 Pa. St. 63; National Exchange Bank *v.* Hartford etc. R. R. Co. 8 R. I. 375. As to Treasury notes, see Frazer *v.* D'Quilliers, 2 Pa. St. 200. See section 9.

(*h*) See section 126. The Wisconsin Act has the following additional provision: "But no order drawn upon or accepted by the treasurer of any county, town, city, village or school district, whether drawn by any officer thereof or any other person, and no obligation or instrument made by any such corporation or any officer thereof, unless expressly authorized by law to be made negotiable, shall be, or shall be deemed to be, negotiable according to the custom of merchants, in whatever form they may be drawn or made. Warehouse receipts, bills of lading and railroad receipts upon the face of which the words 'Not negotiable' shall not be plainly written, printed or stamped, shall be negotiable as provided in section 1676 of the Wisconsin Statutes of 1878, and in sections 4194 and 4425 of these statutes, as the same have been construed by the Supreme Court."

§ 2. **Certainty as to sum; what constitutes.**—The sum payable is a sum certain within the meaning of this act, although it is to be paid:

1. With interest; or

2. By stated instalments (*a*); or

3. By stated instalments, with a provision that upon default in payment of any instalment or of interest (*b*), the whole shall become due; or

4. With exchange, whether at a fixed rate or at the current rate (*c*); or

5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity (*d*).

(*a*) Markey *v.* Corey, 108 Mich. 184; Wright *v.* Irwin, 33 Mich. 32. In this case the note was for $1500, to be paid twenty per cent. a month from the 1st of July, 1871.

(*b*) In the North Carolina Act the words "or interest" are omitted.

(*c*) Second National Bank of Aurora *v.* Basuier, 65 Fed. Rep. 58; Hastings *v.* Thompson, 54 Minn. 184; Flagg *v.* School District, 4 N. D. 30; Whittle *v.* Fond du Lac National Bank (Tex.), 26 S. W. Rep. 1106. *Contra:* Culbertson *v.* Nelson, 93 Iowa 187.

(*d*) As to this point there has been much conflict in the decisions. The rule adopted in the act is the one sustained by the weight of authority. It is supported by National Bank *v.* Sutton Mfg. Co.,

6 U. S. App. 312, 331; Oppenheimer *v.* Farmers' and Merchants' Bank, 97 Tenn. 19; Montgomery *v.* Crossthwait, 90 Ala. 553; Trader *v.* Chichester, 41 Ark. 242; Stapleton *v.* Louisville Banking Co. 95 Ga. 802; Dorsey *v.* Wolff, 142 Ill. 589; Stoneman *v.* Pyle, 35 Ind. 103; Shenandoah Nat. Bank *v.* Marsh, 89 Iowa 273, Rep. 458; Benn *v.* Kutzschan, 24 Oregon 28; Seaton *v.* Scoville, 18 Kans. 433; Dietrich *v.* Boylie, 23 La. Ann. 767; Second National Bank *v.* Anglin, 6 Wash. 403; Heard *v.* Dubuque Bank, 8 Neb. 10; Stark *v.* Olsen, 44 Neb. 646. The courts which have sustained this rule have taken the view that so long as the amount payable is certain up to the time of maturity and dishonor, it is not essential that after that time, when the instrument has become non-negotiable for other reasons, the certainty as to the amount should continue. In the Tennessee case above cited the court said: "Upon a careful review of the authorities, we can perceive no reason why a note otherwise imbued with all the attributes of negotiability is rendered non-negotiable by a stipulation which is entirely inoperative until after the maturity of the note and its dishonor by the maker. The amount to be paid is certain during the currency of the note as a negotiable instrument, and it only becomes uncertain after it ceases to be negotiable by the default of the maker in its payment. It is eminently just that the creditor who has incurred an expense in the collection of the debt should be reimbursed by the debtor by whom the action was rendered necessary, and the expense entailed." The statute has changed the law in Maryland, Maryland Fertilizing Co. *v.* Newman, 60 Md. 584. North Carolina First National Bank *v* Bynum, 84 N. C. 24; Pennsylvania Woods *v.* North, 84 Pa. St. 407. See also Jones *v.* Rodetz, 27 Minn. 240; First Nat. Bank *v.* Gay, 63 Mo. 38; First Nat. Bank *v.* Larsen, 60 Wis. 206; Morgan *v.* Edwards, 53 Wis. 599; Sylvester Bleckley Co. *v.* Alewine, 48 S. C. 308. The question does not appear to have been passed upon by the New York courts. In some States a stipulation to pay a specified percentage as an attorney's fee is void. Levens *v.* Briggs, 21 Oregon 333. The statute, probably, does not change the law of these States, since it does not attempt to validate such provisions, but merely declares that their presence in the instrument does not affect its negotiable quality.

§ 3. **When promise is unconditional.**—An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; (*a*) or

2. A statement of the transaction which gives rise to the instrument (*b*).

But an order or promise to pay out of a particular fund is not unconditional (*c*).

(*a*) The mere mention of a fund in a draft does not necessarily deprive it of the character of commercial paper, but it must further appear, in order to have such effect, that it contains either an express or implied direction to pay it therefrom, and not otherwise. Schmittler *v.* Simon, 101 N. Y. 554, 560. In the case cited, a draft drawn upon an executor contained the words, "and charge the amount against me and of my mother's estate." It was held that the reference to the estate was not a direction to pay out of it, but that the estate was referred to simply as a means of reimbursement. So, in Macleod *v.* Luce, 2 Stra. 762; 2 Ld. Raym. 1481, where the instrument contained the words, "as my quarterly half-pay, to be due from 24th of June to 27th of September next, by advance," the court said, "The mention of the half-pay is only by way of direction how he shall reimburse himself, but the money is still to be advanced on the credit of the person;" and the court accordingly held the instrument to be a bill of exchange. Likewise, in Redman *v.* Adams, 51 Me. 433, where the drawer added, "and charge the same against whatever amount may be due me for my share of fish," it was held that these words were a mere indication of the means of reimbursement, and did not destroy the negotiable character of the draft. And a similar ruling was made in Whitney *v.* Eliot National Bank, 137 Mass. 351, where the directions were, "charge the same to account of 250 bbls. meal exschooner Aurora Borealis." See also Nichols *v.* Ruggles, 76 Me. 27. The test is whether the drawee is confined to the particular fund, or whether, though a specified fund is mentioned, he could have the power to charge the bill up to the general account of the drawer, if the designated fund should turn out to be insufficient. Munger *v.* Shannon, 61 N. Y. 251, 255.

(*b*) This occurs most frequently in the case of notes given in payment of the purchase price of goods and chattels. In Mott *v.* Havana Nat. Bank, 22 Hun, 354, it was held that a provision in

the note that it was to be "in part payment for a portable engine, which engine shall be and remain the property of the owner of this note until the amount hereby secured is paid," did not render the note non-negotiable. So where there was a similar recital as to the title of a piano, for the price of which the note was given. Third Nat. Bank *v.* Bowman, 50 App. Div. 66, reversing S. C. 28 Misc. 7. And so, where there was a recital in the note that it was "given in consideration of a certain patent right." Hereth *v.* Meyer, 33 Ind. 511.

(*c*) Lowery *v.* Steward, 25 N. Y. 239; Munger *v.* Shannon, 61 N. Y. 251; Parker *v.* City of Syracuse, 31 N. Y. 376; Morton *v.* Naylor, 1 Hill, 583. In the case first cited the order was: "Please pay to the order of Archibald H. Lowery the sum of $500 on account of twenty-four bales cotton shipped to you as per bill of lading, by steamer Colorado, inclosed to you in letter." It was held that this was not a bill of exchange, requiring acceptance to bind the drawers, but a specific draft or order upon a particular fund. See also National Savings Bank *v.* Cable (Conn.) 48 Atl. Rep. 428 (a case arising under the statute).

§ 4. **Determinable future time; what constitutes.**—An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable:

1. At a fixed period after date or sight; or

2. On or before a fixed or determinable future time specified therein; (*a*) or

3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain (*b*).

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect (*c*).

(*a*) In such a case the legal rights of a holder are clear and certain; the note is due at a time fixed, and it is not due before. The option of the maker, if exercised, would be a payment in advance of the legal liability to pay, and nothing more. See Mattison *v.* Marks, 31 Mich. 421; Smith *v.* Ellis, 29 Me. 422; Buchanan *v.* Wren (Tex.), 30 S. W. Rep. 1077; Riker *v.* Sprague Mfg. Co., 14

R. I. 402; Kiskadden *v.* Allen, 7 Colorado 206; Jordan *v.* Tate, 19 Ohio St. 586; Albertson *v.* Laughlin, 173 Pa. St. 525. Thus, where the note was made payable twelve months after date, or before, if the money was made out of the sale of a machine, it was held to be negotiable. Ernst *v.* Steckman, 74 Pa. St. 13.

(*b*) Thus, a note payable a certain number of days after the death of the maker, or upon demand after the death of the maker, is a good promissory note, because the event is sure to happen. Carnwright *v.* Gray, 127 N. Y. 92; Hegeman *v.* Moon, 131 N. Y. 462. See also Shaw *v.* Camp, 160 Ill. 425; Martin *v.* Stone (N. H.), 29 Atl. Rep. 845; Price *v.* Jones, 105 Ind. 544; Bristol *v.* Warner, 19 Conn. 74. But an instrument payable when, or in so many days after, "A shall become of age," would not be negotiable, because it is uncertain whether A will live so long. Goss *v.* Nelson, 1 Burr, 226; Rice *v.* Rice, 43 App. Div. (N. Y.) 458; so, a note payable "when A shall marry." Peason *v.* Garrett, 4 Mod. 242; or when a certain ship shall arrive. Coolidge *v.* Ruggles, 15 Mass. 387; Grant *v.* Wood, 12 Gray, 220.

(*c*) Duffield *v.* Johnston, 95 N. Y. 369; First National Bank *v.* Alton, 60 Conn. 402. Thus, where an instrument is made payable when a certain person shall become of age, the fact that he actually attains his majority does not make the instrument negotiable. Goss *v.* Nelson, 1 Burr, 226.

§ 5. **Additional provisions not affecting negotiability.** —An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity (*a*); or

2. Authorizes a confession of judgment if the instrument be not paid at maturity (*b*); or

3. Waives the benefit of any law intended for the advantage or protection of the obligor (*c*); or

4. Gives the holder an election to require something to be done in lieu of payment of money (*d*).

But nothing in this section shall validate any provision or stipulation otherwise illegal (*e*).

(*a*) Collateral notes are often non-negotiable because of some provision therein in regard to the time of payment, or because of provisions requiring something to be done in addition to the payment of money. But a statement that collateral security has been deposited for the performance of the promise contained in the note is a recital only which does not affect its negotiability. Wise *v.* Charlton, 4 A. & E. 486; Fancourt *v.* Thorne, 9 Q. B. 312. And a provision merely authorizing the sale of the collateral, if the note be dishonored, does not have this effect. Perry *v.* Bigelow, 128 Mass. 129; Towne *v.* Rice, 122 Mass. 67; Biegler *v.* Merchants' Loan & Trust Co., 62 Ill. App. 560; Arnold *v.* Rock River Valley Union R. R. Co., 5 Duer, 207. A statement, however, that the note is "given as collateral security with agreement" destroys its negotiable character. Costello *v.* Crowell, 127 Mass. 293.

(*b*) This provision was inserted in the act to meet the requirements in some of the States where judgment notes are in use. Such notes are not known in New York. In Pennsylvania it was held that the warrant of attorney rendered the note non-negotiable. Overton *v.* Tyler, 3 Pa. St. 346; Sweeney *v.* Thickstun, 77 Pa. St. 131.

(*c*) In some of the States it is a common practice to insert in promissory notes a waiver of the benefits of homestead and exemption laws; and this provision of the act is designed to meet such cases. See Zimmerman *v.* Anderson, 67 Pa. St. 421; Zimmerman *v.* Rote, 75 Pa. St. 188.

(*d*) An illustration of this case is the right of the holder to elect to take stock of a corporation in lieu of payment in money. Hodges *v.* Shuler, 22 N. Y. 114. As the obligation of the maker is to pay in money, and as the payment in stock is not optional with him, the note is not within the rule that a negotiable instrument must not be payable in the alternative.—*Id.*

(*e*) The object of this provision is to prevent any inference of an intent to validate any agreement or stipulation mentioned in the section, where, by any statute or settled policy of the State, the same would be illegal. In the Wisconsin Act the following words are added: "or authorize the waiver of exemptions from execution."

§ 6. **Omissions; seal; particular money.**—The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated (*a*); or

2. Does not specify the value given, or that any value has been given therefor (*b*); or

3. Does not specify the place where it is drawn or the place where it is payable (*c*); or

4. Bears a seal (*d*); or

5. Designates a particular kind of current money in which payment is to be made (*e*).

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument (*f*).

(*a*) See section 17, which provides that "where the instrument is not dated, it will be considered to be dated as of the time it was issued." As between the immediate parties parol evidence is admissible to show the true date of a misdated note. Bigge *v.* Piper, 86 Tenn. 589.

(*b*) The words "value received" are not necessary. Daniel on Negotiable Instruments, § 108. Formerly in Connecticut a promissory note, not purporting on its face to be for value received did not import a consideration. Edgerton *v.* Edgerton, 8 Conn. 6; Bristol *v.* Warner, 19 Conn. 7.

(*c*) See sections 3, 28, 77.

(*d*) In two late cases in the Court of Appeals of New York it was held that the commercial paper of a corporation does not lose the quality of negotiability by having attached thereto the corporate seal. Chase Nat. Bank *v.* Faurot, 149 N. Y. 532; Weeks *v.* Esler, 143 N. Y. 374. See also Mackay *v.* St. Mary's Church, 15 R. I. 121. The same rule has been applied to municipal bonds under seal. Bank of Rome *v.* Village of Rome, 19 N. Y. 20; Mercer County *v.* Hacket, 1 Wall. 83. And to the bonds of private corporations. Brainerd *v.* N. Y. & H. R. R. Co., 25 N. Y. 496. So it has been held that the negotiability of a United States treasury note is not restrained or affected by the fact that it is under the treasury seal. Dinsmore *v.* Duncan, 57 N. Y. 573. In Mercer County *v.* Hacket, *supra*, it was said by Justice Geier, speaking of bonds issued under seal: "But there is nothing immoral or contrary to good policy in making them negotiable if the necessities of commerce require that they should be so. A mere technical dogma of the courts or the common law cannot prohibit the commercial

world from inventing or issuing any species of security not known in the last century." See also Mason *v.* Frick, 105 Pa. St. 162 and cases cited; Morris Canal, etc., Co. *v.* Fisher, 9 N. J. Eq. 699; National Exchange Bank *v.* Hartford, P. & F. R. Co., 8 R. I. 375; Jackson *v.* Myers, 43 Md. 452; Muth *v.* Dolfield, 43 Md. 466. *Contra,* Osborne *v.* Hubbard, 20 Oregon 318. The rule adopted in the act existed by statute in the following States: Colorado, Florida, Georgia, Illinois, Kansas, Massachusetts, Nebraska, North Carolina, Ohio, and Tennessee.

(*e*) Thus, a note payable in gold coin is negotiable. Chrysler *v.* Griswold, 43 N. Y. 209. So is a note payable "in bank notes current in the city of New York." Keith *v.* Jones, 9 Johns. 120. A note payable "in New York State bills or specie." Judah *v.* Harris, 19 Johns. 144. And a note payable "in current Florida funds." Williams *v.* Moseley, 2 Fla. 304. But see Wright *v.* Hart's Admr., 44 Pa. St. 454, where it was held that a note payable "in current funds at Pittsburgh" was not negotiable. See also Ford *v.* Mitchell, 15 Wis. 304; Platt *v.* The Sauk County Bank, 17 Wis. 222; Lindsey *v.* McClelland, 18 Wis. 481; Klauber *v.* Biggerstoff, 47 Wis. 551.

(*f*) In a number of the States it is required that notes given in payment of patent rights shall have written on the face thereof "given for a patent right." So there are statutes requiring that what are known as "Bohemian oats" notes shall state the nature of the consideration for which they were given. The above provision is intended to prevent any repeal of such statutes. See Laws Pa. 1872, 60; Haskell *v.* Jones, 86 Pa. St. 173; Shires *v.* Commonwealth, 120 Pa. St. 368; Herdic *v.* Roessler, 109 N. Y. 127.

§ 7. **When payable on demand.**—An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight (*a*), or on presentation; or

2. In which no time for payment is expressed (*b*).

Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand (*c*).

(*a*) By the law merchant there are some distinctions between instruments payable on demand and those payable at sight; as, for example, in the matter of days of grace. See Daniel on Negotiable

Instruments, §§ 617-619, and authorities there cited. This was also the effect of former statutes in some of the States. Walsh *v.* Dart, 12 Wis. 635. The new statute abolishes all these distinctions.

(*b*) Messmore *v.* Morrison, 172 Pa. St. 300; Hall *v.* Toby, 110 Pa. St. 318; James *v.* Brown, 11 Ohio St. 601; Holmes *v.* West, 17 Cal. 623; Porter *v.* Porter, 51 Me. 376; Keyes *v.* Feustomaher, 24 Cal. 329; Bank *v.* Price, 52 Iowa 530; Libby *v.* Mekelborg, 28 Minn. 38; Roberts *v.* Snow, 28 Neb. 425; Bacon *v.* Page, 1 Conn. 405; Raymond *v.* Sellick, 10 Conn. 485; Dodd *v.* Denny, 6 Oregon 156. And the legal intendment that the instrument is payable on demand cannot be changed by parol proof. Roberts *v.* Snow, 28 Neb. 425; Thompson *v.* Ketcham, 8 Johns. 146; Sheldon *v.* Heaton, 88 Hun, 535; Gaylord *v.* Van Loan, 15 Wend. 308; McLeod *v.* Hunter, 29 Misc. 558 (a case arising under the statute); Koehning *v.* Muemminghoff, 61 Mo. 403; Self *v.* King, 28 Tex. 552. The words "on demand" may be added without avoiding the instrument. Byles on Bills, 210.

(*c*) Berry *v.* Robinson, 9 Johns. 121; Leavitt, *v.* Putnam, 1 Sandf. 199; Bassonhorst *v.* Wilby, 45 Ohio St. 336; Light *v.* Kingsbury, 50 Mo. 331; Smith *v.* Caro, 9 Oregon 280; Bemis *v.* McKenzie, 13 Fla. 553. It is commonly said that the indorsement of a bill or note which is overdue is equivalent to drawing a new instrument payable at sight. Bishop *v.* Dexter, 2 Conn. 419; Mudd *v.* Harper, 1 Md. 110. In such cases presentment for payment must be made and notice of dishonor given, as in other instances of instruments payable on demand. Berry *v.* Robinson, 9 Johns. 121; Van Hoosen *v.* Van Alstyne, 9 Wend. 79; Poole *v.* Tolleson, 1 McCord, 200; Patterson *v.* Todd, 18 Pa. St. 420; Rosson *v.* Carroll, 90 Tenn. 90; Brown *v.* Hull, 33 Gratt. 23. Where a note, negotiated before due, is further negotiated after it has been dishonored, the holder takes the legal title, and can maintain a suit upon it in his own name, in the same manner as if he had received it before it was due. French *v.* Jarvis, 29 Conn. 353.

§ 8. **When payable to order.**—The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order (*a*). It may be drawn payable to the order of:

1. A payee who is not maker, drawer or drawee; or
2. The drawer or maker (*b*); or
3. The drawee; or

4. Two or more payees jointly; or

5. One or some of several payees (*c*); or

6. The holder of an office for the time being (*d*).

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty (*e*).

(*a*) By the rules of the law merchant an instrument payable to a specified person without the addition of the word "order," or other word of similar import, was not negotiable. Byles on Bills, p. 83; Smith *v.* Kendall, 6 T. R. 123; Maule *v.* Crawford, 14 Hun, 193; Carnwright *v.* Gray, 127 N. Y. 92. The English Bills of Exchange Act provides that "a bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable." But this change in the law was not deemed advantageous and was not adopted.

(*b*) A note payable to the order of the maker is not complete until indorsed by him. Section 184.

(*c*) Illustration: A draft payable to A, B, and C, or either of them, or any two of them.

(*d*) For example, a note payable to three persons as trustees of an incorporated association, *or their successors in office,* is negotiable. Davis *v.* Gore, 6 N. Y. 124.

(*e*) The payee need not be designated by name. If his identity can be ascertained with certainty, it is sufficient. United States *v.* White, 2 Hill, 59; Blackman *v.* Lehman, 63 Ala. 547.

§ 9. **When payable to bearer.**—The instrument is payable to bearer:

1. When it is expressed to be so payable; or

2. When it is payable to a person named therein or bearer (*a*); or

3. When it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable (*b*); or

4. When the name of the payee does not purport to be the name of any person (*c*); or

5. When the only or last indorsement is an indorsement in blank.

(*a*) Illustration: Instrument payable to "A. B., or bearer." In such case it is negotiable by delivery, and the indorsement of A. B. is not necessary to pass the title therein. See section 30.

(*b*) It has been held that a note made payable to the order of the estate of a deceased person is a promissory note with a fictitious payee, and where it has been negotiated by the maker is deemed as against him to be a note payable to bearer. Lewisohn *v.* The Kent & Stanley Co., 87 Hun, 257. But the correctness of this view seems very questionable. The ground of the rule is that, as the fictitious payee cannot indorse the instrument, the drawer or maker must have intended that it should be payable to bearer. But no such intention can be properly ascribed where the instrument is drawn payable to the order of an estate; for the obvious intention is that it shall be paid upon the order of the decedent's legal representatives, and that they shall indorse the paper. Checks are frequently drawn in this way, and it appears to be the understanding of the business community that they require the indorsement of the executor or administrator. It is essential that the fictitious character of the payee should be known to the person making the instrument so payable. As said by the Court of Appeals of New York, in Shipman *v.* Bank of the State of New York, 126 N. Y. 318, "The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious, and actually intends to make the paper payable to a fictitious person." Hence, if the maker or drawer supposes the payee to be an actually existing person (as, for instance, where he is induced by fraud to draw the instrument to the order of a fictitious person whom he supposes to exist), the instrument will not be payable to bearer, and no person can acquire the title thereto by delivery. And where the instrument is a check, or a bill or note payable at a bank, the bank cannot charge the same to the account of its customer, since the instrument is not in such case payable to bearer, and the indorsement is a forgery. Shipman *v.* Bank of the State of New York, *supra;* Armstrong *v.* Bank, 46 Ohio St. 412; Chisholm *v.* First Nat. Bank of New York (Tenn.), 39 S. W. Rep. 340; Bank of England *v.* Vagliano [1891], App. Cas. 107. But see Clutton *v.* Attenborough [1895], 2 Q. B. 707.

(*c*) For example, a check payable to "cash" or to "sundries."

See Willets *v.* Phœnix Bank, 2 Duer, 121; Mechanics' Bank *v.* Stratton, 2 Keyes, 365.

§ 10. **Terms when sufficient.**—The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof (*a*).

(*a*) It may be written in a foreign language as well as in English. Debebian *v.* Gala, 64 Md. 262, 265. The writing may be in pencil as well as in ink. Brown *v.* Butchers' Bank, 6 Hill, 443. As to the construction of ambiguous instruments, see section 17.

§ 11. **Date, presumption as to.**—Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed *prima facie* to be the true date of the making, drawing, acceptance or indorsement, as the case may be (*a*).

(*a*) But evidence is admissible, as between the immediate parties, to show a mistake in the date. Cowing *v.* Altman, 71 N. Y. 441. If the date is an impossible one, the law will adopt the nearest day. Thus, if the date is written September 31st, the true date will be deemed to be September 30th. Wagner *v.* Kenner, 2 Rob. (La.) 120.

§ 12. **Ante-dated and post-dated.**—The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery (*a*).

(*a*) A post-dated bill or check may be negotiated before the day of its date. Brewster *v.* McCardle, 8 Wend. 478; Pasmore *v.* North, 13 East, 517. In the case last cited the payee who had negotiated a post-dated bill died the day before the day of date; but it was held that the indorsee had derived title through such payee, and could recover of the drawer. If for the purpose of evading the law, a false date is inserted in the instrument, it will be void as to all persons having notice. Serle *v.* Norton, 9 M. & W. 309.

§ 13. **When date may be inserted.**—Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly (*a*). The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date (*b*).

(*a*) See next section.

(*b*) Redlich *v.* Doll, 54 N. Y. 238; Page *v.* Monell, 3 Abb. Ct. App. Dec. 433; Mitchell *v.* Culver, 7 Cow. 333.

§ 14. **Blanks; when may be filled.**—Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein (*a*). And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount (*b*). In order, however, that any such instrument, when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time (*c*).

(*a*) The leading authority upon this point is Russell *v.* Langstaffe, 2 Doug. 514. In that case a person had indorsed his name on five copperplate checks, blank as to amounts, dates and times of payment, and the holder, Galley, filled them up as his own notes

with different dates, amounts and times of payment. The indorser was held liable to the plaintiff, who had discounted them. Lord Mansfield said: "The indorsement on a blank note is a letter of credit for an indefinite sum. The defendant said: 'Trust Galley for any amount, and I will be his security.' It does not lie in his mouth to say the indorsement was not regular." See also Ovrick *v.* Colston, 7 Gratt. 189; Frank *v.* Lilienfeld, 33 Gratt. 377; Boyd *v.* McCann, 10 Md. 118; Elliot *v.* Chestnut, 30 Md. 562; Androscoggin Bank *v.* Kimball, 10 Cush. 373. If the place for the name of the payee is left blank the holder may fill it up with his own name as payee. Boyd *v.* McCann, 10 Md. 118. But it will be noticed that the authority is only to *complete* the instrument, for while there is an authority to fill up blanks in order to make the instrument complete as such, there is no authority to insert a special agreement not essential to the completeness of the instrument. Weyerhauser *v.* Dunn, 100 N. Y. 150.

(*b*) It is to be observed that this rule applies only where the incomplete instrument has been *delivered*. See next section.

(*c*) If the instrument be used, or the blanks filled up contrary to the agreement or intention of the original parties, the maker is held to any *bona fide* holder for value, upon the principle that where one of two innocent parties must suffer by the fraud or wrong of a third person the one who put it in the power of such third person to commit the fraud or wrong must bear the loss. The liability of the maker in such case has also, sometimes, been placed upon the principle of estoppel: he, having put his paper in circulation, and thus invited the public to receive it of any one having apparent title, is estopped to urge the actual defect of title against a *bona fide* holder. Redlich *v.* Doll, 54 N. Y. 234, 238. Where one makes and delivers a promissory note, perfect in form, except that a blank is left after the word "at" for the place of payment, there is an implied authority for any *bona fide* holder to fill the blank, and the insertion of a place of payment, and negotiation of the note, contrary to the agreement of the original parties, does not avoid it in the hands of a *bona fide* holder for value. (*Id.*) So, one who intrusts another with his blank acceptance is liable to a holder for value, though filled up for a sum exceeding that limited by the acceptor. Van Duzer *v.* Howe, 21 N. Y. 531. But where the amount is left blank in the body of the note, and a sum is indicated in figures in the margin, the amount cannot be filled in for a larger sum than that so indicated. Norwich Bank *v.* Hyde, 13 Conn. 284.

§ 15. **Incomplete instrument not delivered.**—Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery (*a*).

(*a*) A negotiable instrument must be complete and perfect when it is issued, or there must be authority reposed in some one afterward to supply anything needed to make it perfect. Sedgwick *v.* McKim, 53 N. Y. 307, 313; Davis Sewing Machine Co. *v.* Best, 105 N. Y. 59, 67. And mere negligence on the part of the person sought to be held liable will not be sufficient to entitle the holder to recover of him on the instrument. Baxendale *v.* Bennett, L. R. 3 Q. B. Div. 525. Thus, in the case cited, where a blank acceptance which had been given to one person and returned by him was afterward stolen from the acceptor and another person filled in his own name and negotiated the bill, it was held that there could be no recovery on such acceptance even by a *bona fide* holder for value. Barnwell, L. J., said: "The defendant here has not voluntarily put into any one's hands the means, or part of the means, for committing a crime. But it is said that he had done so through negligence. I confess I think he has been negligent—that is to say, I think if he had had this paper from a third person as a bailee bound to keep it with ordinary care, he would not have done so. But then this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion."

§ 16. **Delivery; when effectual; when presumed.**—Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto (*a*). As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting (*b*) or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid

delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed (*c*). And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved (*d*).

(*a*) Like other written contracts, a bill of exchange or promissory note has no legal inception or valid existence as such until it has been delivered in accordance with the purpose and intent of the parties. Burson *v.* Huntington, 21 Mich. 416.

(*b*) In the North Carolina Act the word "accepting" is omitted.

(*c*) This provision changes the law in some of the States. In some cases it has been held that an instrument in the form of a negotiable promissory note, which has never been delivered by the alleged maker, has no legal existence as such note, and the party sought to be charged upon it may always, unless estopped by his own negligence, defend successfully against it, without regard to the time when or the circumstances under which it was acquired by the holder. Roberts *v.* McGrath, 38 Wis. 52; Chipman *v.* Tucker, 38 Wis. 43; Griffiths *v.* Kellogg, 39 Wis. 290; Burson *v.* Huntington, 21 Mich. 416. This change, like some others made by the act, is in the direction of facilitating the circulation of commercial paper. The provision does not apply, however, in the case of an incomplete instrument completed and negotiated without authority. See section 15.

(*d*) Possession of the instrument is *prima facie* evidence of title. Newcombe *v.* Fox, 1 App. Div. 389.

§ 17. **Construction where instrument is ambiguous.**— Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, references may be had to the figures to fix the amount (*a*);

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is

to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;

3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued (*b*);

4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail (*c*);

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election (*d*);

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser (*e*);

7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon (*f*).

(*a*) The figures in the margin of a bill or note are regarded as simply a memorandum or abridgement for convenience of reference, and form no part of the instrument. Smith *v.* Smith, 1 R. I. 388.

(*b*) Knisley *v.* Sampson, 100 Ill. 54.

(*c*) But this rule does not permit of the rejection of any of the printed matter which by any reasonable construction may be reconciled with the written part. Miller *v.* Hannibal & St. Jo. R. R. Co., 90 N. Y. 430; Magee *v.* Lovell, L. R. 9 C. P. 107; Joyce *v.* Realm Ins. Co. L. R., 7 Q. B. 580.

(*d*) Heise *v.* Bumpass, 40 Ark. 547. Where the instrument ran "On demand, I promise to pay A. B., or bearer, the sum of fifteen pounds, value received," and was addressed in the margin to one J. Bell, who wrote upon it, "Accepted, J. Bell," it was considered to be in effect the note of Bell, as it contained a promise to pay, although, in terms, it was an acceptance. Block *v.* Bell, 1 M. & R. 149. Where the instrument was in the following form: "London, August 5, 1833. Three months after date I promise to pay Mr. John Bury or order forty-four pounds, eleven shillings, and five pence, value received, John Bury," and was addressed in the lower left-hand corner "J. B. Grutherot, 35 Montague Place, Bedford Place," and Grutherot's name was written across the face as an acceptance, and Bury's name across the back as an indorsement, it was

held that Bury might be held either as the drawer of the bill against Grutherot, or as the maker of the note, and therefore was bound without notice of dishonor. Edis *v.* Bury, 6 Barn. & Cres. 433. In another case the instrument ran: "Two months after date I promise to pay A. B. or order ninety-nine pounds, H. Oliver," and was addressed to J. E. Oliver and accepted by him. The court said: "It is not unjust to presume that it was drawn in this form for the purpose of suing upon it either as a promissory note or as a bill of exchange." Lloyd *v.* Oliver, 18 Q. B. 471.

(*e*) For example, if a person should write his name across the face of a note, he would under this provision be deemed an indorser. There are some decisions which hold that in such case he would be deemed a joint maker. It is, perhaps, not very important which view is adopted, so that the rule upon the subject is fixed and certain. Throughout the act it has been the policy to make all irregular parties indorsers. See section 64.

(*f*) Monson *v.* Drakeley, 40 Conn. 559; Solomon *v.* Hopkins, 61 Conn. 47; Dart *v.* Sherwood, 7 Wis. 523. In the Wisconsin Act another subdivision is added as follows: "8. Where several writings are executed at or about the same time, as parts of the same transaction intended to accomplish the same object, they may be construed as one and the same instrument as to all parties having notice thereof."

§ 18. **Liability of person signing in trade or assumed name.** — No person is liable on the instrument whose signature does not appear thereon (*a*), except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name (*b*).

(*a*) Persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them, and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent. Manufacturers' Etc. Bank *v.* Love, 13 App. Div. 561; Briggs *v.* Partridge, 64 N. Y. 363.

(*b*) A person may become a party to a bill or note by any mark or designation he chooses to adopt, provided it be used as a substitute for his name and he intends to be bound by it. De Witt *v.*

Walton, 9 N. Y. 574; Brown *v.* Butchers' & Drovers' Bank, 6 Hill, 443.

§ 19. **Signature by agent; authority; how shown.**—The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.

§ 20. **Liability of person signing as agent, etc.**—Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized (*a*); but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability (*b*).

(*a*) In the original draft submitted to the Conference of Commissioners on Uniformity of Laws this section read as follows: "Where a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument; but the mere addition of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability. In determining whether a signature is that of the principal or of the agent by whose hand it is written, that construction is to be adopted which is most favorable to the validity of the instrument." This is the English rule, and was the rule in New York prior to the statute. Under that rule a person signing for or on behalf of a principal was not liable *on the instrument,* notwithstanding he had no authority to bind his principal. There was an implied warranty on his part that he possessed such authority, and if he did not he became liable upon such warranty for the damages resulting from the breach. Miller *v.* Reynolds, 92 Hun, 400. But no action could be maintained against him on the instrument when by its terms it did not purport to bind him. And his liability upon the implied warranty did not accompany the transfer of the instrument, unless the claim founded upon the warranty was also assigned to the person to whom the instrument was transferred. (*Id.*) The effect

of the section, as it now stands, is to permit the holder to sue the agent on the instrument, if he was not duly authorized to sign the same on behalf of the principal.

(*b*) Thus, he is not relieved from liability by adding the descriptive term "trustee," Bank *v.* Looney, 99 Tenn. 278, or "administrator," or "guardian," Emm *v.* Carroll, 1 Yerger, 144; McWherter *v.* Jackson, 10 Humphrey, 208; Carter *v.* Wolf, 1 Heisk, 674, or "agent," Sumwalt *v.* Rigeley, 20 Md. 107. Where a negotiable promissory note has been given for the payment of a debt contracted by a corporation, and the language of the promise does not disclose the corporate obligation, and the signatures to the paper are in the names of individuals, a holder, taking *bona fide* and without notice of the circumstances of its making, is entitled to hold the note as the personal undertaking of its signers, notwithstanding they affix to their names the title of an office. Such an affix will be regarded as descriptive of the persons, and not of the character of the liability. Unless the promise purports to be by the corporation, it is that of the persons who subscribe to it; and the fact of adding to their names an abbreviation of some official title has no legal signification as qualifying their obligation, and imposes no obligation upon the corporation whose officers they may be. This rule is founded on the general principle that in a contract every material thing must be definitely expressed, and not left to conjecture. Unless the language creates, or fairly implies, the undertaking of the corporation, or if the purpose is equivocal, the obligation is that of its apparent makers. Casco National Bank *v.* Clark, 139 N. Y. 307, 310; First Nat. Bank *v.* Wallis, 150 N. Y. 455.

§ 21. **Signature by procuration; effect of.**—A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority (*a*).

(*a*) The words "per procuration" have a special technical significance. They are an express intimation of a special and limited authority; and a person taking a bill so drawn, accepted, or indorsed, is bound to inquire into the extent of the authority. Byles on Bills, 33. But an indorsement by an agent "per pro" which is within the powers conferred upon him is binding upon his principal as against *bona fide* holders for value, though the agent

abused his authority. Bryant *v.* La Banque du Peuple [1893], App. Cases, 170. The term is seldom, if ever, used in this country.

§ 22. **Effect of indorsement by infant or corporation.** —The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation (*a*) or infant (*b*) may incur no liability thereon.

(*a*) Thus, if a note should be drawn payable to the order of a corporation, and the corporation should indorse the same without consideration, such indorsement would pass the title to a subsequent holder with notice of the facts, though the corporation would not be liable to him as an indorser. See note to section 29.

(*b*) The statute changes the law. See Roach *v.* Woodall, 91 Tenn. 206. The change, like others, was made to facilitate the ready and safe transfer of commercial paper.

§ 23. **Forged signature ; effect of.**— When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature (*a*), unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority (*b*).

(*a*) Buckley *v.* Second Nat. Bank of Jersey City, 35 N. J. Law, 400; Whiteford *v.* Munroe, 17 Md. 135.

(*b*) Where the transaction is contrary to good faith and the fraud affects individual interests only, ratification is allowed; but where the fraud is of such a character as to involve a crime the adjustment of which is forbidden by public policy, the ratification of the act from which it springs is not permitted. Forgery does not admit of ratification. A forger does not act on behalf of, nor profess to represent, the person whose handwriting he counterfeits; and the subsequent adoption of the instrument cannot supply the authority which the forger did not profess to have. Henry Chris-

tian Building and Loan Association *v.* Walton, 181 Pa. St. 201; Lyson *v.* Phillips, 106 Pa. St. 57. But cases sometimes arise where parties are estopped to dispute the genuineness of their signatures. Crout *v.* DeWolf, 1 R. I. 393. Thus, where a customer has been guilty of negligence in examining the account and vouchers returned to him by his bank, he will not be permitted to dispute the account because some of the checks are forgeries. Leather Manufacturers' Nat. Bank *v.* Morgan, 117 U. S. 96. Where one whose name has been forged to a note has received no benefit from the forgery, and the forger was not his agent for any purpose, he is not bound, as a matter of legal duty, when the note is first shown to him, to repudiate or disclaim at once the genuineness of the signature. His failure to do so is evidence, in the nature of an admission, which may be considered as bearing upon the question whether he assumed the signature as his own, but it is not conclusive. Traders' National Bank *v.* Rogers, 167 Mass. 315. As to what conduct will amount to an estoppel, see Terry *v.* Bissell, 26 Conn. 41. Where one procures a check by falsely pretending that he is another person, and indorses it in the name of such payee, the indorsement conveys no title. Talman *v.* American Nat. Bank (R. I.), 48 Atl. Rep. 480 (a case arising under the statute). But see Land Etc. Co. *v.* Northwestern Nat. Bank, 196 Pa. St. 230.

ARTICLE II.*

Consideration of Negotiable Instruments.

Section 24. Presumption of consideration.
25. What constitutes consideration.
26. What constitutes holder for value.
27. When lien on instrument constitutes holder for value.
28. Effect of want of consideration.
29. Liability of accommodation party.

* The numbers of the sections of this article in States other than Pennsylvania are as follows: Colorado, Connecticut, District of Columbia, Florida, Massachusetts, North Carolina, North Dakota, Oregon, Tennessee, Utah, Virginia, and Washington, 24-29; New York, 50-55; Maryland, 43-48; Rhode Island, 32-37; Wisconsin, 1675-50 to 1675-55.

§ 24. **Presumption of consideration.**—Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value (*a*).

(*a*) Riverside Bank *v.* Woodhaven Junc. L. Co., 34 App. Div. (N. Y.) 362; Delano *v.* Bartlett, 6 Cushing, 364; Lines *v.* Smith, 4 Fla. 47; Flint *v.* Phipps, 16 Oregon 437. This is the rule, though no consideration be expressed. Wilson *v.* Wilson, 26 Oregon 315. See section 6. The statute makes this rule applicable only to instruments which are negotiable. But by the law merchant a bill of exchange, though it lacks the words payable "to order," or to "bearer," which are essential to negotiability (see sections 1, 126), imports a consideration. Louisville R. R. Co. *v.* Caldwell, 98 Ind. 251; Cowan *v.* Hallock, 9 Colo. 576. The statute has not altered this rule. See section 196. But as regards the presumption of consideration in the case of non-negotiable notes, the law of New York and of some of the other States has been changed. See note to section 184. As to the burden of proof, see Delano *v.* Bartlett, 6 Cushing, 364.

§ 25. **Consideration, what constitutes.**—Value is any consideration sufficient to support a simple contract (*a*). An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time (*b*).

(*a*) See Conover *v.* Stillwell, 34 N. J. Law, 54; Eaton *v.* Libbey, 165 Mass. 218; Whitney *v.* Clary, 145 Mass. 156; Shawmut Nat. Bank. *v.* Manson, 168 Mass. 425; Raymond *v.* Sellick, 10 Conn. 480.

(*b*) This section makes an important change in the law of New York. It abolishes the rule in the leading case of Coddington *v.* Bay, 20 Johns. 637, and the numerous cases based upon that decision. Brewster *v.* Shrader, 26 Misc. (N. Y.) 480. In the case last cited Werner, J., approved of the view expressed in the first edition of this work, and said: "The language of this section, when given its usual and ordinary signification, ought to leave no room for doubt upon the subject. There is, however, such a universal disposition among lawyers to look for some hidden or subtle meaning in the most simple language that it has become quite the

fashion to require the courts to construe statutes which to the average lay mind seem to require no construction." See also Brooks *v.* Sullivan, (N. C.) 39 S. E. Rep. 822. The general rule is that where a conveyance is made or security taken, the consideration of which is an antecedent debt, the grantee or the person taking the security is not regarded as a purchaser for a valuable consideration. People's Savings Bank *v.* Bates, 120 U. S. 556, 565; Weaver *v.* Borden, 49 N. Y. 286; Cary *v.* White, 52 N. Y. 138; Wood *v.* Robinson, 22 N. Y. 567; Mingus *v.* Condit, 23 N. J. Eq. 313. But in the Supreme Court of the United States, and in many of the State courts, a distinction has been made in favor of commercial paper, and the rule adopted that a *bona fide* holder taking a negotiable instrument in payment of, or as security for, an antecedent debt, is a holder for a valuable consideration entitled to protection against all the equities between the antecedent parties. Railroad Company *v.* National Bank, 102 U. S. 14; Swift *v.* Tyson, 16 Pet. 1; National Revere Bank *v.* Morse, 163 Mass. 381; Roberts *v.* Hall, 37 Conn. 205; Bridgeport City Bank *v.* Welch, 29 Conn. 475; Harrold *v.* Kays, 64 Mich. 439; Fitzgerald *v.* Booker, 96 Mo. 661; Spencer *v.* Sloan, 108 Ind. 183; Quinn *v.* Hoord, 43 Vt. 375; Armour *v.* McMichael, 36 N. J. Law, 92; Fisher *v.* Fisher, 98 Mass. 303; Roberts *v.* Hall, 37 Conn. 205; Giovanovich *v.* Citizens' Bank, 26 La. Ann. 15; Maitland *v.* Citizens' Nat. Bank, 40 Md. 540; Robins *v.* Lair, 31 Iowa 9; Bonaud *v.* Genesi, 42 Ga. 639. In the case of Railroad Company *v.* National Bank, *supra,* the subject was exhaustively examined by the Supreme Court of the United States, and the rule laid down that the transfer before maturity of negotiable paper as security for an antecedent debt merely, without other circumstances, if the paper be so indorsed that the holder becomes a party to the instrument, although the contract is without express agreement by the creditor for an indulgence, is not an improper use of such paper, and is as much in the usual course of business as its transfer in payment of such debt; and that in either case the *bona fide* holder is unaffected by equities or defenses between prior parties of which he had no notice. This exception to the general rule is based upon considerations of commercial policy, and is peculiar to commercial paper. Prior to the adoption of the statute, the New York rule was well settled that one who acquired commercial paper as collateral security for a pre-existing debt was not a holder for value. Comstock *v.* Hier, 73 N. Y. 269; McBride *v.* Farmers' Bank, 26 N. Y. 450; Coddington *v.* Bay, 20 Johns. 637.

This rule produced many subtle refinements, and it would be impossible to reconcile all the decisions of the New York courts on the subject. The statute changes the law in several other States, viz.: Pennsylvania, Schaeffer *v.* Fowler, 111 Pa. St. 451; Tennessee, Martin *v.* Bank, 94 Tenn. 176; Roach *v.* Woodall, 91 Tenn. 206; and Wisconsin, Jenkins *v.* Schnaub, 14 Wis. 1. For the former law in the case of accommodation paper pledged as security see Stephen *v.* Monongahela National Bank, 88 Pa. St. 157; National Union Bank *v.* Todd, 132 Pa. St. 312.

§ 26. **What constitutes holder for value.**—Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time (*a*).

(*a*) If a party becomes a *bona fide* holder for value of a bill before its acceptance, it is not essential to his right to enforce it against a subsequent acceptor that an additional consideration should proceed from him to the drawee. The bill itself implies a representation by the drawer that the drawee is already in receipt of funds to pay, and his contract is that the drawee shall accept and pay according to the terms of the draft. The drawee can, of course, upon presentment refuse to accept, and in that event the only recourse of the holder is against the prior parties thereto; but in case the drawee does accept the bill, he becomes primarily liable for its payment, not only to the indorsees, but also to the drawer himself. Heuertematte *v.* Morris, 101 N. Y. 70.

§ 27. **When lien on instrument constitutes holder for value.**—Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien (*a*).

(*a*) Continental Nat. Bank *v.* Bell, 125 N. Y. 38, 42; Rogers *v.* Squires, 98 N. Y. 49; Roach *v.* Woodall, 91 Tenn. 206. If a negotiable promissory note, which is without consideration as between the original parties thereto, is delivered without consideration to another person, who pledges it, before its maturity, as collateral security for a debt of his own for a less amount than the face of the note, the pledgees, if they take it without notice, are to be deemed holders for value, and may maintain an action thereon for

the amount due to them upon the debt which it was pledged to secure. Fisher *v.* Fisher, 98 Mass. 303. A bank, having in its possession negotiable securities of its customer, would be, by virtue of its general lien, a holder for value to the extent of the balance due from such customer. So, any person to whom negotiable securities are pledged as collateral would be deemed a holder for value to the extent of the amount due to him. But if such securities should be sold to pay such balance or debt, the purchaser, if a holder in due course within section 52, though he should pay less than their face value for them, could enforce them for the full amount thereof. See section 57.

§ 28. **Effect of want of consideration.**—Absence or failure of consideration is matter of defense as against any person not a holder in due course (*a*); and partial failure of consideration is a defense *pro tanto* (*b*), whether the failure is an ascertained and liquidated amount or otherwise (*c*).

(*a*) As between the immediate parties to a negotiable promissory note, while the note itself is *prima facie* evidence of the consideration, the question of consideration is always open; and it is competent to the defendant to show, by parol, that there was no sufficient consideration, or that the consideration has failed, or that the paper was given for accommodation merely. Ingersoll *v.* Martin, 58 Md. 67; Corlies *v.* Howe, 11 Gray, 125; Breneman *v.* Furniss, 90 Pa. St. 186. The burden of proving the failure of consideration is on the party alleging it. Jennison *v.* Stafford, 1 Cush. 168. Total failure of consideration does not impose upon an innocent holder the burden of proving that he gave value for the paper. Wilson *v.* Lazier, 11 Gratt. 477; Albrecht *v.* Atrimpler, 7 Pa. St. 476. The failure of consideration does not affect the negotiability of the instrument. Dingman *v.* Amsink, 77 Pa. St. 114. The right to interpose the defense of want of consideration is governed by the *lex loci*. Herdic *v.* Roessler, 109 N. Y. 127, 133, 134. Upon an exchange of promissory notes, each note is a valid consideration for the other, and is fully available in the hands of the holder; and the fact that one of the notes is not paid at maturity does not sustain a defense of failure of consideration in an action upon the other. Rice *v.* Grange, 131 N. Y. 149; Woman *v.* Frost, 52 N. Y. 422.

(*b*) Black *v.* Rigway, 131 Mass. 80; Cline *v.* Miller, 8 Md. 274; Davis *v.* Wait, 12 Oregon 425.

(*c*) The rule, both in this country and in England, has been that whenever the defendant is entitled to go into the question of consideration he may set up the partial, as well as the total, want of consideration. Daniel on Negotiable Instruments, § 210. But it has been held in some cases that the part alleged to have failed must be distinct and definite, for only a total failure or the failure of a specific and ascertained part can be availed of by way of defense; and in the case of an unliquidated claim the party must resort to his cross action. Pulsifer *v.* Hotchkiss, 12 Conn. 234; Drew *v.* Towle, 7 Fost. 412; Moggridge *v.* Jones, 14 East. 485; Trickey *v.* Larne, 6 M. & W. 278. In other cases it is held that the defendant may recoup his damages though they be unliquidated. Davis *v.* Wait, 12 Oregon 425; Wyckhoff *v.* Runyon, 33 N. J. Law, 107. As to what is necessary to constitute one a holder in due course, see sections 26, 52.

§ 29. **Liability of accommodation party.**—An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person (*a*). Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party (*b*).

(*a*) An accommodation note, in the strict sense, is a loan of the maker's credit, without instructions as to the manner of its use. Lenheim *v.* Wilmarding, 55 Pa. St. 73. He cannot set up as a defense that it was given without consideration; for this would defeat the very purpose for which it was made. Carpenter *v.* National Bank of the Republic, 106 Pa. St. 170-172. In respect to third persons the law considers him in the character he has assumed and will not permit him to allege that the paper to which he gave his name was an imposition, nor to gainsay its reality by proof that it was a fiction. It shall be taken *pro veritate* that he was the maker, for *de veritate* that was the very thing he was intended to be. Bank of Montgomery County *v.* Walker, 9 S. & R. 229; Stephen *v.* Monongahela National Bank, 88 Pa. St. 157, 162-3. And this is the rule though the note be pledged merely as collateral

security for the debt of the payee. Lord *v.* Ocean Bank, 20 Pa. St. 384. A mutual exchange of notes will amount to a sufficient consideration, so that notes will not be regarded as accommodation paper. Williams *v.* Banks, 11 Md. 198; Rice *v.* Grange, 131 N. Y. 149; Woman *v.* Frost, 52 N. Y. 422.

(*b*) But an accommodation indorser has the right to retract his indorsement at any time before the paper is negotiated. His consent to be indorser is necessary to make him such. He cannot be compelled to indorse whether he will or no; and as the instrument is a mere blank piece of paper until it passes into other hands for valuable consideration, it follows that he has the same right to retract the indorsement already made as he had to refuse his indorsement in the first instance; that is, his indorsement and his continuing to be so are alike voluntary until rights arise by the negotiation to third parties. Berkely *v.* Tinsley, 88 Va. 1001, 1004. And the purchaser of an accommodation note, after its maturity, gets no better nor greater right to enforce it against the maker or indorser than if it were ordinary negotiable paper given for value. Cottrell *v.* Watkins, 89 Va. 801. The provision of the statute does not apply to corporations, which, as a general rule, are without power to bind themselves as accommodation parties. A national bank has no such power, National Bank of Commerce *v.* Atkinson, 55 Fed. Rep. 465, 27 U. S. App. 88; nor has a State bank, The Bank of Genesee *v.* The Patchin Bank, 13 N. Y. 309; Farmers' & Mechanics' Bank *v.* Butchers' & Drovers' Bank, 16 N. Y. 125, 128; Morford *v.* The Farmers' Bank of Saratoga County, 26 Barb. 568; nor a manufacturing corporation, The Central Bank *v.* the Empire Stone Dressing Co., 26 Barb. 23; The Bridgeport City Bank *v.* The Empire Stone Dressing Co., 30 Barb. 421; The Farmers' & Mechanics' Bank *v.* The Empire Stone Dressing Co., 5 Bosw. 275; Wahlig *v.* The Standard Pump Manufacturing Co., 25 N. Y. St. Repr. 864; Filon *v.* The Miller Brewing Co., 38 N. Y. St. Repr. 602; Monument National Bank *v.* Globe Works, 101 Mass. 57; nor a railroad company, Davis *v.* Old Colony Railroad Company, 131 Mass. 258; nor a warehousing and security company, The National Park Bank *v.* G. A. M. W. & S. Co., 116 N. Y. 281; nor a life insurance company, Ætna National Bank *v.* Charter Oak Life Insurance Company, 50 Conn. 167; nor a turnpike company, Hall *v.* Auburn Turnpike Co., 27 Cal. 256; nor an oil company, Culver *v.* Reno Real Estate Company, 91 Penn. St. 367. No corporations organized under the statutes of New York are authorized to bind the property of their shareholders by accom-

modation indorsements. Fox *v.* Rural Home Co., 90 Hun, 365, 367. But where a corporation is authorized to take a note for any purpose, the presumption in regard to any note executed to it is that it was executed for a legitimate purpose. Howard *v.* Boorman, 17 Wis. 459; Lehigh Valley Coal Co. *v.* West Depere Agr. Works, 63 Wis. 45. An indorsement by a partner of his separate accommodation note with the name of his firm is a sufficient indication of the nature of the transaction to make it the duty of the bank which discounts it to inquire into his authority to use the firm name for the occasion, unless there are circumstances from which the authority can be implied. Tanner *v.* Hall, 1 Pa. St. 417. The statute does not change the rule that an accommodation party has the right to determine for himself what use shall be made of the instrument which he signs. He may impose material or immaterial conditions and terms, and no person can enforce the instrument against him who takes it in violation of such terms and conditions and with notice thereof. Benjamin *v.* Rogers, 126 N. Y. 60. Thus, where the defendant indorsed a note upon the condition that it should not be negotiated in New York, assigning as a reason that he did not wish to be sued upon it in this State, it was held that, while the restriction did not seem to be material, yet the diversion was a defense to the indorser as against one who was not a holder for value. United States Nat. Bank *v.* Ewing, 131 N. Y. 506. But see Rogers *v.* Sipley, 35 N. J. Law, 86.

ARTICLE III.*

Negotiation.

Section 30. What constitutes negotiation.
31. Indorsement; how made.
32. Indorsement must be of entire instrument.
33. Kinds of indorsement.
34. Special indorsement; indorsement in blank.

* The numbers of the sections of this article in States other than Pennsylvania are as follows: Colorado, Connecticut, District of Columbia, Florida, Massachusetts, North Carolina, North Dakota, Oregon, Tennessee, Utah, Virginia, and Washington, 30-50; New York, 60-80; Maryland, 40-69; Rhode Island, 38-58; Wisconsin, 1676-1676-20.

Section 35. Blank indorsement; how changed to special indorsement.
36. When indorsement restrictive.
37. Effect of restrictive indorsement; rights of indorsee.
38. Qualified indorsement.
39. Conditional indorsement.
40. Indorsement of instrument payable to bearer.
41. Indorsement where payable to two or more persons.
42. Effect of instrument drawn or indorsed to a person as cashier.
43. Indorsement where name is misspelled, et cetera.
44. Indorsement in representative capacity.
45. Time of indorsement; presumption.
46. Place of indorsement; presumption.
47. Continuation of negotiable character.
48. Striking out indorsement.
49. Transfer without indorsement; effect of.
50. When prior party may negotiate instrument.

§ 30. **What constitutes negotiation.**—An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer (*a*) it is negotiated by delivery; if payable to order (*b*) it is negotiated by the indorsement (*c*) of the holder completed by delivery (*d*).

(*a*) As to what instruments are payable to bearer, see section 9.

(*b*) As to what instruments are payable to order, see section 8.

(*c*) An indorsement is usually written on the back of the instrument, but the place is not essential. If the payee write his name on any part of the instrument, with the intention of indorsing it, that is a sufficient indorsement. Haines *v.* Dubois, 29 N. J. Law, 259.

(*d*) The indorsement alone without delivery conveys no title. Dann *v.* Norris, 24 Conn. 337; Clark *v.* Sigourney, 17 Conn.

520; Middleton *v.* Griffith, 57 N. J. Law, 442. Spencer *v.* Carstarphen, 15. Colo. 445. As between the original parties and others having notice, a conditional delivery, as well as want of consideration, may be shown; and parol evidence that the delivery was conditional, and of the terms of the condition, is not open to the objection of varying or contradicting the written contract. Higgins *v.* Ridgeway, 153 N. Y. 130; Persons *v.* Hawkins, 41 App. Div. (N. Y.) 171; Simmons *v.* Thompson, 29 App. Div. (N. Y.) 559; Ricketts *v.* Pendleton, 14 Md. 320; McFarland *v.* Sikes, 54 Conn. 250. But a parol agreement, although entered into at the time of making negotiable paper, that the payee will not negotiate it and will renew it, etc., is inadmissible to vary the effect of the paper. Heist *v.* Hart, 73 Pa. St. 286. So, it has been held that evidence of an oral agreement that payment was not to be called for until certain paintings of the maker had been sold is an attempt to vary the written contract. Wooley *v.* Cobb, 165 Mass. 503. See Woods Son Co. *v.* Schaefer, 173 Mass. 443. By the statutes of some of the States, notes made payable to a person named therein or bearer must be indorsed to pass the legal title. Garvin *v.* Wiswell, 83 Ill. 218; Blackman *v.* Lehman, 63 Ala. 547.

§ 31. **Indorsement; how made.**—The indorsement must be written on the instrument itself or upon a paper attached thereto (*a*). The signature of the indorser, without additional words, is a sufficient indorsement (*b*).

(*a*) Crosby *v.* Roub, 16 Wis. 616; Folger *v.* Chase, 18 Pick. 63; French *v.* Turner, 15 Ind. 59. The rule as commonly stated is, that where there is not room on the bill, the indorsement may be on an allonge. But it is not necessary that there should be a physical impossibility of writing the indorsement on the instrument itself; it may be on an allonge, whenever the necessity or convenience of the parties requires it. See cases above cited. Besides, any such statement of the rule would give rise to a question of fact which might be determined variously. But see Bishop *v.* Chase, 156 Mo. 158; Franklin *v.* Twogood, Iowa, 515; Peach *v.* Bligh, 37 Ill. 317; Haskell *v.* Brown, 65 Ill. 29; Wall *v.* Hollenbeck, 19 Neb. 639.

(*b*) This is the customary and mercantile form of indorsement. But an indorsement of a promissory note as follows, "For value received, I hereby assign, transfer and set over to B all my right,

title, interest and claim in the within note," passes a legal title to the same and does not destroy its negotiability. Hall *v.* Toby, 110 Pa. St. 318.

§ 32. **Indorsement must be of entire instrument.**— The indorsement must be an indorsement of the entire instrument. An indorsement, which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument (*a*). But where the instrument has been paid in part, it may be indorsed as to the residue (*b*).

(*a*) For example, where a note for $500 was indorsed, "Pay to L four hundred dollars out of this note," it was held that L could not recover from the maker. Lindsay *v.* Price, 33 Tex. 282.

(*b*) The indorsement of a partial payment on the instrument does not render it non-negotiable. Smith *v.* Shippey, 182 Pa. St. 24.

§ 33. **Kinds of indorsement.**—An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional.

§ 34. **Special indorsement; indorsement in blank.**— A special indorsement specifies the person to whom, or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery (*a*).

(*a*) See section 9.

§ 35. **Blank indorsement; how changed to special ndorsement.** — The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement (*a*).

(*a*) Beckwith *v.* Angell, 6 Conn. 317. Thus, he might write over it a special indorsement to himself or to some other person. But he could not write over it a contract of guaranty; for the effect of this would be to deprive the indorser of his right of notice in case of non-payment. Belden *v.* Hann, 61 Iowa 42. Such a contract would be inconsistent with the character of the indorsement.

§ 36. **When indorsement restrictive.**—An indorsement is restrictive, which either:

1. Prohibits the further negotiation of the instrument (*a*); or

2. Constitutes the indorsee the agent of the indorser (*b*); or

3. Vests the title in the indorsee in trust for or to the use of some other person (*c*).

But the mere absence of words implying power to negotiate does not make an indorsement restrictive (*d*).

(*a*) "Pay Bank of A only" would be such an indorsement as is meant here.

(*b*) The most frequent instance of this is the indorsement "for collection." Such indorsement does not transfer the title to the indorsee, but constitutes him merely an agent to present the paper, and receive payment thereof for the account of the owner. Commercial National Bank *v.* Armstrong, 148 U. S. 50; National Butchers' and Drovers' Bank *v.* Hubbell, 117 N. Y. 384; Armstrong *v.* National Bank of Boyertown, 90 Ky. 431; Freeman's Bank *v.* National Tube Works, 151 Mass. 413; Sweeney *v.* Easter, 1 Wall. 173; Commercial National Bank *v.* Hamilton National Bank, 42 Fed. Rep. 880; City Bank of Sherman *v.* Weiss, 68 Tex. 332; Central R. R. Co. *v.* First National Bank of Lynchburg, 73 Ga. 384; Bank of Metropolis *v.* First National Bank of Jersey City, 19 Fed. Rep. 658; Blaine *v.* Bourne, 11 R. I. 119; Cecil Bank *v.* Farmers' Bank, 22 Md. 148; Northwestern National Bank *v.* Bank of Commerce, 107 Mo. 402. As to the liability of an indorser to whom the instrument has been indorsed "for collection," see note to section 66.

(*c*) Lloyd *v.* Sigourney, 5 Bing. 252; 3 M. & P. 229; Snee *v.* Prescott, 1 Atk. 245. Illustration: Pay A for account of B. In

such case the title passes to A; but the indorsement is restrictive to the extent that it gives notice that the instrument cannot be negotiated by A for his own debt or for his own benefit. Hook *v.* Pratt, 78 N. Y. 371, 375.

(*d*) Thus, if the instrument is drawn to the order of A, his indorsement "Pay to B" does not restrict the further negotiation of the instrument, though the words "or order" are not included in the indorsement. See Leavitt *v.* Putnam, 3 N. Y. 494.

§ 37. **Effect of restrictive indorsement; rights of indorsee.**—A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument;

2. To bring any action thereon that the indorser could bring (*a*);

3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

(*a*) The holder of negotiable paper may sue in his own name, though but an agent for others. Ward *v.* Tyler, 52 Pa. St. 393. The statute enables a bank to sue in its own name on paper indorsed to it "for collection." As to whether this could be done before the statute there was some conflict in the authorities. The right is sustained by Wilson *v.* Tolson, 79 Ga. 137; Cummings *v.* Kohn, 12 Mo. App. 585; Wintermute *v.* Torrent, 83 Mich. 555; Regina Flour Mill Co. *v.* Holmes, 156 Mass. 11; Spofford *v.* Norton, 126 Mass. 333; Whiten *v.* Hayden, 9 Allen, 408; Roberts *v.* Parrish, 17 Oregon 583; McDaniel *v.* Pressler, 3 Wash. 636; Ward *v.* Tyler, 52 Pa. St. 393. But in Rock County National Bank *v.* Hollister (21 Minn. 385) it was held that the provisions of the Code requiring the action to be brought in the name of the real party in interest would prevent an indorsee to whom the instrument was indorsed "for collection" from maintaining the action.

§ 38. **Qualified indorsement.**—A qualified indorsement constitutes the indorser a mere assignor of the title to the

instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import (*a*). Such an indorsement does not impair the negotiable character of the instrument (*b*).

(*a*) Grant *v.* Fleming, 46 Pa. St. 140; Cowles *v.* Harts, 3 Conn. 522. But the words employed must clearly indicate that the indorser intends to disclaim liability. Fassin *v.* Hubbard, 55 N. Y. 470. Hence, where the payee writes above his signature an assignment in the following form, "I hereby assign the within note to—" this does not relieve him from liability as an indorser. Markey *v.* Corey, 108 Mich. 184. The words "without recourse" following the name of the first, and preceding the name of a second, indorser may, as between them, be shown by parol evidence to apply to the former instead of to the latter. Corbett *v.* Fetzer, 47 Neb. 269. And this although the second indorsee took it without knowing that the limitation was applicable to the first indorser. Fitchburg Bank *v.* Greenwood, 2 Allen, 434.

(*b*) A qualified indorsement in no respects affects the negotiability of the instrument, but simply qualifies the duties, obligations and responsibilities of the indorser resulting from the general principles of the law. Stewart *v.* Preston, 1 Fla. 10, 22. And whatever interest would pass by a general or full indorsement will pass by a qualified indorsement. Stewart *v.* Preston, 1 Fla. 10, 22; Epler *v.* Funk, 8 Pa. St. 468. If the indorsement is in blank, without recourse, any subsequent holder is authorized to fill up the blank with his own name as indorser. Lyon *v.* Ewings, 17 Wis. 61. A qualified indorsement is not such a departure from the usual course of business as to put the transferee on inquiry as to the equities between the original parties. Bisbing *v.* Graham, 14 Pa. St. 14; Lomax *v.* Picot, 2 Rand. 260.

§ 39. **Conditional indorsement.**—Where an indorsement is conditional, a party required to pay the instrument may disregard the condition and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not (*a*). But any person to whom an instrument so indorsed is negotiated will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally (*b*).

(*a*) The first sentence is the same as section 33 of the English Bills of Exchange Act with a slight modification. In his note to that section Judge Chalmers says: "This section alters the law. It was formerly held that if a bill was indorsed conditionally, the acceptor paid it at his peril if the condition was not fulfilled. This was hard on him. If he dishonored the bill he might be liable to damages, and yet it might be impossible for him to find out if the condition had been fulfilled." See Daniel on Neg. Inst., sections 697, 698*a*. There appear to be no American cases upon the subject; and the only English case is Robertson *v.* Kensington (4 Taunt. 30).

(*b*) The rule adopted here is somewhat analogous to that which gives to an indorser who has paid a note in part an equitable right *pro tanto* in the proceeds, where the holder afterward collects the whole amount of the note from the maker. See Madison Square Bank *v.* Pierce, 137 N. Y. 444.

§ 40. Indorsement of instrument payable to bearer.—Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery (*a*); but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

(*a*) See Johnson *v.* Mitchell, 50 Tex. 212; Smith *v.* Clarke, Peake, 225; Daniel on Neg. Inst., sections 663*a*, 696. Where a bill accepted and indorsed by the payee, in blank, was by the next holder indorsed specially, it was held, that the first indorsement being in blank, the bill was afterward transferable by mere delivery, and that a holder, by delivery, might strike out the special indorsement and in a suit against the acceptors declare and recover, as the indorsee of the payee. Mitchell *v.* Fuller, 15 Pa. St. 268.

§ 41. Indorsement where payable to two or more persons.—Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.

§ 42. **Effect of instrument drawn or indorsed to a person as cashier.**—Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer (*a*).

(*a*) It is common practice for banks to indorse in this manner paper remitted for collection. The rule above stated as to indorsements to cashiers of banks is supported by the following cases: Bank of the State *v.* Muskingum Bank, 29 N. Y. 619; First Nat. Bank *v.* Hall, 44 N. Y. 395; Bank of Genesee *v.* Patchin Bank, 19 N. Y. 312; Folger *v.* Chase, 18 Pick. 63; Farmers' etc., Bank *v.* Troy City Bank, 1 Dough. (Mich.) 457; Watervliet Bank *v.* White, 1 Denio, 608; Lookout Bank *v.* Aull, 93 Tenn. 645. The commissioners deemed it wise to extend the rule to all fiscal officers of corporations. Under this provision an indorsement to the treasurer of a savings bank would make the paper payable to the bank. So of an indorsement to the secretary of a trust company.

§ 43. **Indorsement where name is misspelled, et cetera.**— Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature (*a*).

(*a*) Thus, one who, while carrying on business on his own account in the name of a company which has been incorporated, but not organized, receives in payment of a debt contracted with him in such business a promissory note payable to the order of the corporation, may transfer the note by indorsing it in his own name. Bryant *v.* Eastman, 7 Cush. 111. Conversely, a man will be bound by paper made by him in the name he adopts in his business. Salmon *v.* Hopkins, 61 Conn. 47.

§ 44. **Indorsement in representative capacity.**— Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability (*a*).

(*a*) As to the liability of executors and administrators who accept or indorse, see Schmittler *v.* Simon, 101 N. Y. 554.

§ 45. **Time of indorsement; presumption.**—Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue (*a*).

(*a*) Mason *v.* Noonan, 7 Wis. 609. If the defendant alleges that the paper was indorsed after it was due, the burden of proof is on him to show it. White *v.* Camp., 1 Fla. 94. This rule is important because that, in order to constitute one a holder in due course, he must have taken the instrument before it was overdue. See section 91. The indorsement of an overdue note cannot relate back to the date of the note; as a new and independent contract, it takes effect from the time it is made, and must be determined by the laws then in force and the circumstances then existing. Brown *v.* Hull, 33 Gratt. 23, 30.

§ 46. **Place of indorsement; presumption.**—Except where the contrary appears every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated (*a*).

(*a*) As an indorsement is not merely a transfer of the instrument, but is a new and substantive contract embodying in itself all the terms of the instrument, the place where it was made often becomes of importance. See Ingalls *v.* Lee, 9 Barb. 947; Brown *v.* Hull, 33 Gratt. 27, 29; Smith *v.* Caro, 9 Oregon 278; Bank of British N. Am. *v.* Ellis, 6 Sawyer, 98; Freese *v.* Brownell, 35 N. J. Law 285. For example, an indorsement in Massachusetts of a note executed and payable in New York is a Massachusetts contract, and governed by the law of that State. Glidden *v.* Chamberlin, 167 Mass. 486.

§ 47. **Continuation of negotiable character.**—An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise (*a*).

(*a*) Cumberland Bank *v.* Hann, 3 Harr. (N. J.) 222. The law is perfectly well settled that a note or bill negotiable in form is negotiable as well after as before it becomes due. National Bank of Washington *v.* Texas, 20 Wall. 72. McSherry *v.* Brooks, 46 Md. 103, 118; French *v.* Jarvis, 29 Conn. 347; Adair *v.* Lenox, 15 Oregon 489. But the rights, duties and obligations of the parties are by no means the same. The instrument becomes, according to legal effect, payable on demand, so far as the indorser is concerned; and presentment for payment must be made within a reasonable time, and due notice of the dishonor given to the indorser. Brown *v.* Hull, 33 Gratt. 23, 28; Berry *v.* Robinson, 9 Johns. 121; Van Hoosen *v.* Van Alstyne, 3 Wend. 79; Poole *v.* Tolleson, 1 McCord, 200; Patterson *v.* Todd, 18 Pa. St. 426; Rosson *v.* Carroll, 90 Tenn. But if the paper was presented at maturity and notice of dishonor given to prior parties it is not necessary that the indorsee after maturity should, in order to hold them, present the paper again and give them then notice of dishonor; for the original demand and notice were to the benefit of all subsequent holders. French *v.* Jarvis, 29 Conn. 347. As to the discharge of negotiable instruments, see sections 200-206.

§ 48. **Striking out indorsement.**—The holder may at any time strike out any indorsement which is not necessary to his title (*a*). The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.

(*a*) He may strike out all intervening indorsements, and aver that the first blank indorser indorsed immediately to himself. Byles on Bills, 149; Preston *v.* Mann, 25 Conn. 127; Bank of America *v.* Senior, 11 R. I. 376. This may be done at the trial, and after the plaintiff has finished his case. Mayer *v.* Jadis, 1 M. & Rob. 247. See also Morris *v.* Cude, 57 Tex. 337; Rand *v.* Dovey, 83 Pa. St. 281; Merz *v.* Kaiser, 20 La. Ann. 379; Vanarsdale *v.* Hax, 107 Fed. Rep. 878.

§ 49. **Transfer without indorsement; effect of.**—Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferrer had therein, and

the transferee acquires, in addition, the right to have the indorsement of the transferrer (*a*). But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made (*b*).

(*a*) Simpson *v.* Hall, 47 Conn. 417. Thus, the purchaser of a certified check, payable to order, who obtains title without the indorsement of the payee, holds it subject to all equities between the original parties, although he paid full consideration, without notice. Goshen National Bank *v.* Bingham, 118 N. Y. 349; Jenkinson *v.* Wilkinson, 110 N. C. 532. And an intention on the part of the payee and transferee to have the paper indorsed is not sufficient, at least in the absence of an express agreement to indorse. It is the act of indorsement, not the intention, which negotiates the instrument. Goshen National Bank *v.* Bingham, *supra*.

(*b*) An indorsement after notice of a defense does not relate back to the transfer, so as to cut off intervening rights and remedies. (*Id.*) But in Beard *v.* Dedolph (29 Wis. 136) it was held that the holder is protected against everything subsequent to delivery, the indorsement being held to relate back to the time of delivery as to any equity outside of the note itself.

§ 50. **When prior party may negotiate instrument.**—Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

ARTICLE IV.*

RIGHTS OF THE HOLDER.

Section 51. Right of holder to sue; payment.
52. What constitutes a holder in due course.

* The numbers of the sections of this article in other States than Pennsylvania are as follows: Colorado, Connecticut, District of Columbia, Florida, Massachusetts, North Carolina, North Dakota, Oregon, Tennessee, Utah, Virginia and Washington, 51-59; New York, 90-98; Maryland, 70-78; Rhode Island, 59-67; Wisconsin, 1676-21-1676-29.

Section 53. When person not deemed holder in due course.
54. Notice before full amount paid.
55. When title defective.
56. What constitutes notice of defect.
57. Rights of holder in due course.
58. When subject to original defenses.
59. Who deemed holder in due course.

§ 51. **Right of holder to sue; payment.**—The holder of a negotiable instrument may sue thereon in his own name (*a*); and payment to him in due course discharges the instrument (*b*).

(*a*) This applies to a holder to whom the instrument is indorsed restrictively. See section 37 and note. Where the plaintiff is the payee, the production of the paper is sufficient. Williams *v.* Holt, 170 Mass. 351. And where the instrument is payable to bearer, or, if payable to order, is indorsed in blank, possession is sufficient evidence of title on which to maintain the action. Newcomb *v.* Fox, 1 App. Div. 389; Weber *v.* Orton, 91 Mo. 680. The court will never inquire whether he sues for himself or as trustee for another, nor into the right of possession, unless on an allegation of *mala fides*. Ellicott *v.* Martin, 6 Md. 509. And the *prima facie* case made in favor of the plaintiff by his possession of the instrument can not, in the absence of *mala fides*, be rebutted by evidence that the title was in some other party. (*Id.*) As a general rule, possession by the attorney for a party is possession by the party himself. Kunkel *v.* Spooner, 9 Md. 462.

(*b*) The maker of a note, in order to avail himself of the defense of payment before maturity, must show that the indorsee had prior notice of the payment. Yenney *v.* Central City Bank, 44 Neb. 402.

§ 52. **What constitutes a holder in due course.**—A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face (*a*);

2. That he became the holder of it before it was overdue (*b*), and without notice that it had been previously dishonored, if such were the fact;

3. That he took it in good faith and for value (*c*);

4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it (*d*).

(*a*) To determine the character of an indorsee as a *bona fide* holder for value without notice, the point of time at which he parts with his money is the important fact. If the paper was then on its face irregular—out of the usual course of business—the effect of that knowledge on the indorsee could not be prevented by subsequently putting it in a regular shape. Losee *v.* Bissell, 76 Pa. St. 459, 462. As to incomplete instruments, and the authority to fill up blanks therein, see section 33.

(*b*) McKim *v.* King, 58 Md. 502; Marsh *v.* Marshall, 53 Pa. St. 396; Davis *v.* Miller, 14 Gratt. 1; Cottrell *v.* Watkins, 89 Va. 801. At one time it was doubted whether the mere fact that a negotiable note was overdue at the time of the transfer was in itself sufficient to affect the title of the holder, and whether it was not necessary that there should be something on the face of the paper besides the day of payment to show that it had been actually dishonored. This doubt was expressed by Lord Kenyon in Brown *v.* Davies, 3 T. R. 80, decided in 1789; but Ashurst and Buller, J.J., were of opinion that the mere fact of its being overdue at the time of the transfer was sufficient to affect the title, and that one taking a note under such circumstances takes it upon the credit of the transferrer. Subsequently in Boehm *v.* Sterling, 7 T. R. 423-430, Lord Kenyon gave his assent to the rule thus laid down, and it has never since been questioned. A promissory note matures when, by its terms, the principal becomes due; and one who purchases it in good faith, for value, before maturity, is within the protection of the law merchant, although interest is overdue at the time of such purchase. Kelley *v.* Whitney, 45 Wis. 110. But see Hart *v.* Stickney, 41 Wis. 630; Newell *v.* Gregg, 51 Barb. 253. But a note payable by instalments is overdue when the first instalment is overdue and unpaid, and one who takes it afterward takes it subject to all equities between the original parties. Vinton *v.* King, 4 Allen, 562. A transfer upon the day of maturity is before the instrument is overdue; for the principal debtor has the whole of that day in which to pay. Continental Nat. Bank *v.* Townsend, 87 N. Y. 8. But see Sargent *v.* Southgate, 5 Pick. 312; Ayer *v.* Hutchins, 4 Mass. 370; Pine *v.* Smith, 11 Gray, 38. A check de-

posited with a bank on the day of its date can not be considered as overdue when so deposited. Shawmut National Bank *v.* Manson, 168 Mass. 425.

(*c*) Where the payees give the usual written direction in accommodation notes, at the foot of the note, "credit the drawer," and the note is afterward discounted in bank, or found in the possession of any person not a party to the original transaction, the presumption is that the holder is a holder for value, and that the drawer received the proceeds according to the directions so given. Steckel *v.* Steckel, 28 Pa. St. 233, 235. As to what will constitute value, see section 25. *Prima facie* value is presumed. See section 24.

(*d*) As to what is necessary to constitute notice, see section 56.

§ 53. **When person not deemed holder in due course.** —Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course (*a*).

(*a*) As to what is a reasonable time will depend upon the facts of the particular case. See section 4. No absolute measure can be fixed. A day or two, Field *v.* Nickerson, 13 Mass. 131, 137; seven days, Thurston *v.* McKenn, 6 Mass. 428; and even a month, Ranger *v.* Cory, 1 Mete. 369, is not too long; while eight months, American Bank *v.* Jenness, 2 Mete. 288; Ayres *v.* Hutchins, 4 Mass. 370; Nevins *v.* Townsend, 6 Conn. 7; three months and a half, Stevens *v.* Brice, 21 Pick. 193; and even two months and a half, Losee *v.* Durkin, 7 J. R. 70; and Sice *v.* Cunningham, 1 Cowen, 397, 404, have been deemed sufficient to discredit a note. Coupons payable to bearer are, when overdue, subject to equities; they are not in this respect like bank notes. McKim *v.* King, 58 Md. 502.

§ 54. **Notice before full amount paid.** — Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him (*a*).

(*a*) Dresser *v.* Missouri Etc. R. R. Construction Co., 93 U. S.

93. The case falls within the general rule that the portion of an unperformed contract which is completed after notice of a fraud is not within the principle which protects a *bona fide* purchaser. (*Id.*)

§ 55. **When title defective.**—The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, (*a*) or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud (*b*).

(*a*) Commercial paper executed under duress is void, even though there may be some consideration to support it. Magoon *v.* Reber, 76 Wis. 392.

(*b*) The fraud in putting the paper into circulation must be a fraud against the defendant. Kinney *v.* Kruse, 28 Wis. 183. Thus, the fact that one who held possession of a note for the payee put it in circulation in fraud of his rights is no defense in a suit by the holder against the maker. (*Id.*) And where the fraud consists in the misapplication of the proceeds received for the paper it will not affect the paper in the hands of the holder, as he is not in any manner bound to look to their application, nor responsible for the misappropriation of them. Gray's Admr. *v.* Bank of Kentucky, 29 Pa. St. 365. There is no distinction between obtaining a note by fraud and fraudulently putting it in circulation. National Revere Bank *v.* Morse, 163 Mass. 381, 385. In the Wisconsin Act the following is added: "And the title of such person is absolutely void when such instrument or signature was so procured from a person who did not know the nature of the instrument and could not have attained such knowledge by the use of ordinary care."

§ 56. **What constitutes notice of defect.**—To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith (*a*).

(*a*) The holder is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance; he does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The holder's rights cannot be defeated without proof of actual notice of the defect in title or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *mala fide*, his title, according to settled doctrine, will prevail. Cheever *v.* Pittsburgh, Shenango & Lake Erie R. R. Co., 150 N. Y. 59, 65; American Exchange National Bank *v.* New York Belting etc. Co., 148 N. Y. 705; Knox *v.* Eden Musee Am. Co., 148 N. Y. 454; Canajoharie National Bank *v.* Diefendorf, 123 N. Y. 202; Vosburgh *v.* Diefendorf, 119 N. Y. 357; Jarvis *v.* Manhattan Beach Co., 148 N. Y. 652; Murray *v.* Lardner, 2 Wall. 110; Swift *v.* Smith, 102 U. S. 442; Belmont *v.* Hoge, 35 N. Y. 65; Welsh *v.* Sage, 47 N. Y. 143; Nat. Bank of Republic *v.* Young, 41 N. J. Eq. 531; Fifth Ward Sav. Bank *v.* First Nat. Bank, 48 N. J. Law 513; Credit Company *v.* Howe Machine Co., 54 Conn. 357; Ladd *v.* Franklin, 37 Conn. 64; Croft's Appeal, 42 Conn. 154; Morton *v.* N. A. & Selma Ry. Co., 79 Ala. 590; Phelan *v.* Moss, 67 Pa. St. 59; Moorehead *v.* Gilmore, 77 Pa. St. 118; Second National Bank *v.* Morgan, 165 Pa. St. 199; Frank *v.* Lilienfeld, 33 Gratt. 377. While gross carelessness will not, as a matter of law, defeat title in a purchaser for value, it may constitute evidence of bad faith. Canajoharie National Bank *v.* Diefendorf, 123 N. Y. 191. The payment of value is a circumstance to be taken into account, with other facts, in determining the good faith of the purchaser, but it is not conclusive. Cunningham *v.* Scott, 90 Hun, 410, 411. And while the mere fact that paper has been purchased at a discount will not, ordinarily, be evidence of bad faith, yet where the discount is very large, that circumstances may be considered, in connection with other facts, in determining the question of the purchaser's good faith. Williams *v.* Huntington, 68 Md. 590.

The mere fact that the holder for value of a promissory note made by a third party receives it from a person engaged in the note-brokerage business, as collateral security for a loan to such broker, is not sufficient to raise a doubt as to the authority of the broker to so deal with the note. American Ex. Nat. Bank *v.* New

York Belting and Packing Company, 148 N. Y. 698. And a bank has a right to assume, as to notes offered to it, whether for discount or as collateral security, by a customer who has an account with it, and who is in the habit of borrowing money from it, that the customer is acting in good faith and within his lawful rights; and the fact that the customer is engaged in the business of note-brokerage is not enough to deprive the bank of the right to indulge in such assumption. (*Id.*) The fraudulent misappropriation by the broker of the proceeds of discount is not sufficient to put the holder to the proof of his *bona fides*. Sloan *v.* The Union Banking Company, 67 Pa. St. 470.

One who receives the notes of a corporation from one of its officers in payment of, or as security for, a personal debt of such officer does so at his peril. *Prima facie* the act is unlawful, and, unless actually authorized, the purchaser will be deemed to have taken them with notice of the rights of the corporation. Wilson *v.* Metropolitan Ry. Co., 120 N. Y. 145, 150. And where the maker of a note, which is payable to his order, and purports to be indorsed by a corporation, procures it to be discounted for his own benefit, this of itself, if unexplained, is notice that the indorsement is not made in the usual course of business, but is for the accommodation of the maker. National Park Bank *v.* German-American Mutual Warehousing and Security Company, 116 N. Y. 281.

§ 57. **Rights of holder in due course.**—A holder (*a*) in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, (*b*) and may enforce payment of the instrument for the full amount thereof (*c*) against all parties liable thereon (*d*).

(*a*) The payee will be protected as a *bona fide* holder to the same extent and under like conditions as an indorsee. Lookout Bank *v.* Aull, 93 Tenn. 645.

(*b*) As this provision is general, and the statute provides for no exceptions, it makes a change in the law of many States. For example, it was formerly held in some States that a note given in a gambling transaction, though negotiable in form, was void in the hands of an innocent holder for value. Harper *v.* Young, 112 Pa. St. 419; Emerson *v.* Townsend, 73 Md. 224; Snoddy *v.* Bank,

88 Tenn. 573. And in some States a similar rule obtained in the case of notes tainted with usury. (As to the effect of the Tennessee Statutes see Bradshaw *v.* Van Valkenberg, 97 Tenn. 316, 320.) So of notes obtained from the maker by fraud. Lowers *v.* Thomas, 62 Wis. 480; Walker *v.* Ebert, 29 Wis. 194; Foster *v.* McKinnon, L. R. 4 C. P. 704. But probably none of these defenses are good under the statute. The change was made to facilitate the circulation of commercial paper. In Wirt *v.* Stubblefield, 17 App. Cas. D. C. 283, it was held that under the Negotiable Instruments Law a *bona fide* holder may enforce a promissory note against the maker, even though the note was given for a gambling debt, and that this statute has repealed the statutes of 16 Car. 2 Ch. 7 and 9 Anne, Ch. 14, which were in force in the District of Columbia. In the course of the opinion it was said by Alvey, C. J.: "We know, moreover, that the great and leading object of the act, not only with Congress, but with the large number of the principal commercial States of the Union that have adopted it, has been to establish a uniform system of law to govern negotiable instruments wherever they might circulate or be negotiated. It was not only uniformity of rules and principles that was designed, but to embody in a codified form, as fully as possible, all the law upon the subject, to avoid conflict of decisions, and the effect of mere local laws and usages that have heretofore prevailed. The great object sought to be accomplished by the enactment of the statute, to free the negotiable instrument, as far as possible, from all latent or local infirmities that would otherwise inhere in it to the prejudice and disappointment of innocent holders as against all the parties to the instrument professedly bound thereby. This clearly could not be effected so long as the instrument was rendered absolutely null and void by local statute, as against the original maker or acceptor, as is the case by the operation, indeed, by the express provision, of the statutes of Charles and Anne." It is to be hoped that other courts having to construe the act will take an equally liberal and enlightened view. For the former rule in Pennsylvania in such cases see Northern Nat. Bank *v.* Arnold, 187 Pa. St. 356.

(*c*) This is the rule of the Supreme Court of the United States. Cromwell *v.* County of Sac, 96 U. S. 60. There is considerable conflict in the decisions of the State courts. In the case cited the Supreme Court said: "We are of opinion that a purchaser of a negotiable security before maturity, in cases where he is not personally chargeable with fraud, is entitled to recover its full amount against its maker, though he may have paid less than its par value,

whatever may have been its original infirmity. We are aware of numerous decisions in conflict with this view of the law; but we think the sounder rule, and the one in consonance with the common understanding and usage of commerce, is that the purchaser, at whatever price, takes the benefit of the entire obligation of the maker. Public securities and those of private corporations are constantly fluctuating in price in the market, one day being above par and the next below it, and often passing within short periods from one-half of their nominal to their full value. Indeed, all sales of such securities are made with reference to prices current in the market, and not with reference to their par value. It would introduce, therefore, inconceivable confusion if *bona fide* purchasers in the market were restricted in their claims upon such securities to the sums they had paid for them. This rule in no respect impinges upon the doctrine that one who makes a loan upon such paper, or takes it as collateral security for a precedent debt, may be limited in his recovery to the amount advanced or secured." See also Birrell *v.* Dickerson, 64 Conn. 61; Rowland *v.* Fowler, 47 Conn. 349; Williams *v.* Huntington, 68 Md. 590; Moore *v.* Baird, 30 Pa. 136. The statute changes the rule in New York. Harger *v.* Wilson, 63 Barb. 237; Huff *v.* Wagner, 63 Barb. 230; Todd *v.* Shelbourne, 8 Hun, 512. See also Holcomb *v.* Wyckoff, 35 N. J. Law 38; Bramhall *v.* Atlantic National Bank, 36 N. J. Law 243; Oppenheimer *v.* Farmers' and Mechanics' Bank, 97 Tenn. 19. But where the note has been taken as collateral security, the pledgee can recover only to the extent of the debt due him, where the pledgor has no right to recover at all. Chicopee Bank *v.* Chapin, 8 Mete. 40. See Sec. 54. For cases where the purchaser has paid only part of the amount agreed to be paid before receiving notice, see section 93.

(*d*) In the Wisconsin Act the following is added: "Except as provided in sections 1944 and 1945 of these statutes, relating to insurance premiums, and also in cases where the title of the person negotiating such instrument is void under the provision of section 1676-25 of this act."

§ 58. **When subject to original defenses.**—In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable (*a*). But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has

all the rights of such former holder in respect of all parties prior to the latter (*b*).

(*a*) It was not deemed expedient to make provision as to what equities the transferee will be subject to; for the matter may be affected by the statutes of the various States relating to set-off and counter-claim. In an act designed to be uniform in the various States, no more can be done than fix the rights of holders in due course. On the question whether only such equities may be asserted as attach to the bill, or whether equities arising out of collateral matters may also be asserted, the decisions are conflicting. In England it was decided in Burroughs *v.* Moss, 10 Barn & Cress. 558, that the indorsee of an overdue bill is liable to such equities only as attach on the bill or note itself, and not to claims arising out of collateral matters, such as a general set-off is. This is a leading case, and has since been uniformly followed in that country. Stein *v.* Yglesias, 1 Crom. Mees. & Ros. 565; Whitehead *v.* Walker, 10 Mees. & Welsb. 696. See also Hughes *v.* Large, 2 Pa. St. 103; Long *v.* Rhawn, 75 Pa. St. 128; Young *v.* Shriner, 80 Pa. St. 463; Davis *v.* Miller, 14 Gratt. 1; Kilcrease *v.* White, 6 Fla. 45; Cumberland Bank *v.* Haun., 3 Harrison, 223; Chandler *v.* Drew, 6 N. H. 469; Robertson *v.* Breedlone, 7 Porter, 541; Tuscumbia, Etc., R. R. Co. *et al. v.* Rhodes, 8 Ala. 206-224; Robinson *v.* Lymon, 10 Conn. 31; Steadman *v.* Jilman, *Id.*, 56; Adair *v.* Lenox, 15 Oregon, 489. A person to whom the instrument is transferred as a gift takes it subject to all equities then existing between the original parties, but not subject to those which arise thereafter. First Nat. Bank of Champlain *v.* Wood, 128 N. Y. 35; Baxter *v.* Little, 6 Met. 7.

(*b*) Whenever negotiable paper has passed into the hands of a party unaffected by previous infirmities its character as an available security is established, and its holder can transfer it to others with the like immunity. Cover *v.* Myers, 75 Md. 406. The principle is, that the promise being good to the prior indorsee or holder, free from objection on the ground of fraudulent or illegal consideration, he has the power of transferring it to others, with the same immunity, as an incident to the legal right which he had acquired in the instrument. Kinney *v.* Kruse, 28 Wis. 183, 190-191. See also Boyd *v.* McCann, 10 Md. 118. Thus, if A gives to B his note, and C becomes the holder thereof in due course, any subsequent holder could stand on C's title and enforce the note against A, though before taking the same he had notice of a defense which A

had to the note as against B. But if, in the case supposed, the note should be indorsed by C to D, and by the latter to E, and by him to F, under circumstances which would give D a defense as a party thereto, then if F had notice of the equities of both A and D he could enforce the note against A, but not against D. In the Wisconsin Act the word "duress" is inserted after the word "fraud" in the second sentence, and "such holder" is substituted for "the latter."

§ 59. **Who deemed holder in due course.** — Every holder is deemed *prima facie* to be a holder in due course (*a*); but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course (*b*). But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title (*c*).

(*a*) The presumption is that the indorsee of negotiable paper received it *bona fide* and for value. Gray's Admr. *v.* Bank of Kentucky, 29 Pa. St. 365; Wilson *v.* Lazier, 11 Gratt. 477.

(*b*) The holder may make out his title by presumption until it is impeached by evidence showing the paper had a fraudulent or illegal inception. When this is done he can no longer rest upon presumption, but it is incumbent upon him to show the circumstances under which it came into his possession, and that he has acted in good faith. Canajoharie National Bank *v.* Diefendorf, 123 N. Y. 191; Joy *v.* Diefendorf, 130 N. Y. 6; Jordan *v.* Grover, 99 Cal. 194; Market and Fulton Nat. Bank *v.* Sargent, 85 Me. 349; Haines *v.* Merrill, 56 N. J. Law, 312; Sullivan *v.* Langley, 120 Mass. 437; Merchants' National Bank *v.* Haverhill Iron Works, 159 Mass. 158; Conant *v.* Johnston, 165 Mass. 450, 452; National Revere Bank *v.* Morse, 163 Mass. 381, 385; Williams *v.* Huntington, 68 Md. 590; Griffith *v.* Shipley, 74 Md. 591; Ellicott *v.* Martin, 6 Md. 509; Hutchinson *v.* Boggs & Kirk, 28 Pa. St. 294; Wilson *v.* Lazier, 11 Gratt. 477; Vathir *v.* Zane, 6 Gratt. 246. And where the plaintiff seeks to establish this by his own testimony, the credibility of such testimony, though it is undisputed, is for the jury. Joy *v.* Diefendorf, *supra*. Where negotiable securities have been stolen and negotiated, the burden is upon the holder to show that he is

himself a holder in due course, or that he claims under such a holder; and there is no presumption that the thief negotiated the securities before they became due. Northampton Nat. Bank *v.* Kidder, 106 N. Y. 221; Hinckley *v.* Merchants' Nat. Bank, 131 Mass. 147. That the payee is described as "trustee" does not let in defenses against a *bona fide* holder for value. Bank *v.* Looney, 99 Tenn. 278. As to when the question of good faith is for the jury, see M. Groh's Son's Co. *v.* Schneider, 34 Misc. (N. Y.) 195 (a case arising under the statute).

(*c*) The last sentence is necessary to qualify the general statement. If A issues his note to B, and C gets possession of it and fraudulently negotiates it to D, the fraud of C in nowise affects A, and is no defense to him when sued on the instrument by D. Thus, it has been held that the fact that one who held possession of a note for the payee put it in circulation in fraud of his rights is no defense in a suit by the holder against the maker; nor does it change the burden of proof, so as to require the plaintiff to show in the first instance that he is a *bona fide* holder for value. Kinney *v.* Kruse, 28 Wis. 183.

ARTICLE V.*

Liabilities of Parties.

Section 60. Liability of maker.
61. Liability of drawer.
62. Liability of acceptor.
63. When person deemed indorser.
64. Liability of irregular indorser.
65. Warranty; where negotiation by delivery, et cetera.
66. Liability of general indorsers.
67. Liability of indorser where paper negotiable by delivery.
68. Order in which indorsers are liable.
69. Liability of agent or broker.

* The numbers of the sections of this article in other States than Pennsylvania are as follows: Colorado, Connecticut, District of Columbia, Florida, Massachusetts, North Carolina, North Dakota, Oregon, Tennessee, Utah, Virginia and Washington, 60-69; New York, 110-119; Maryland, 79-88; Rhode Island, 68-77; Wisconsin, 1677-1677-9.

§ 60. **Liability of maker.**—The maker of a negotiable instrument by making it engages that he will pay it according to its tenor (*a*); and admits the existence of the payee and his then capacity to indorse (*b*).

(*a*) The fact that the holder had other collateral securities for the same debt more than sufficient to cover it, from which, however, the debt had not been realized, is not a ground of defense on the part of the maker. Lord *v.* Ocean Bank, 20 Pa. St. 384.

(*b*) If the payee is a fictitious or non-existing person the instrument is payable to bearer. Section 9. Where the name of the payee is a trade or assumed name, and the instrument is issued for value, the maker is estopped from setting up that the instrument is payable to a fictitious payee, if by such averment the instrument would be defeated. Jones *v.* Home Furnishing Co., 9 App. Div. (N. Y.) 103.

§ 61. **Liability of drawer.**—The drawer by drawing this* instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent (*a*) indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder.

(*a*) In the Colorado Act the word "subsequent" is omitted.

§ 62. **Liability of acceptor.**—The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance (*a*); and admits:

1. The existence of the drawer, the genuineness of his signature (*b*), and his capacity (*c*) and authority (*d*) to draw the instrument; and

* Error in engrossing. The word in the Commissioners' draft is "the." This mistake occurs only in the Pennsylvania statute.

2. The existence of the payee and his then capacity to indorse (*c*).

(*a*) The discounting of a bill by the drawee who has not accepted it is neither payment nor a promise to pay according to its tenor and effect, but puts him in the position of an indorsee for value, with right of action against drawer and indorser. Swope *v.* Ross, 40 Pa. St. 186.

(*b*) National Park Bank *v.* Ninth National Bank, 46 N. Y. 77; Marine National Bank *v.* National City Bank, 59 N. Y. 67; Bank of St. Albans *v.* Farmers' and Mechanics' Bank, 10 Vt. 141; Bank of U. S. *v.* Bank of Georgia, 10 Wheat. 333. In Pennsylvania this matter was formerly regulated by the statute of 1849. The effect of that statute and the cases upon the subject was that the mere acceptance or payment of forged paper was no longer of itself a bar to the recovery of the money by the party paying, nor was such party absolutely bound to discover and give notice of the forgery on the very day of payment. All that he need do in any case was to give ample notice promptly according to the circumstances and the usage of the business, and unless the position of the party receiving the money had been altered for the worse in the meantime, the date of notice was not material. Iron City Nat. Bank *v.* Fort Pitt Nat. Bank, 159 Pa. St. 46, 52. As to other cases on this subject see People's Bank *v.* Franklin Bank, 88 Tenn. 299; First Nat. Bank of Danvers *v.* First Nat. Bank of Salem, 151 Mass. 280; Nat. Bank of North America *v.* Bangs, 106 Mass. 441; Ellis *v.* Insurance Company, 4 Ohio St. 628; First Nat. Bank *v.* Ricker, 71 Ill. 439; Rouvant *v.* San Antonio Nat. Bank, 63 Tex. 610; Deposit Bank of Georgetown *v.* Fayette Nat. Bank, 90 Ky. 10. Acceptance admits the signature of the drawer, but is no proof or admission of the indorsement by the payee, whether the bill be payable to the drawer's own order or that of another person. Williams *v.* Drexel, 14 Md. 566. And the drawee is not presumed to know the handwriting in the body of the instrument. Continental Nat. Bank *v.* Tradesman's Bank, 36 App. Div. 112; Gunston *v.* Heat and Power Co. 181 Pa. St. 327.

(*c*) Thus, if the bill is drawn by a corporation, he cannot set up as a defense that it was without legal capacity to draw the bill. Halifax *v.* Lyle, 3 Welsby, H. & G. 446. So, if the bill is drawn by an infant, Jones *v.* Darch, 4 Price, 300; Taylor *v.* Croker, 4 Esp. 187; or a married woman, Cowton *v.* Wickersham, 54 Pa. St. 302.

(*d*) The delivery of a bill or check by one person to another for

value implies a representation on the part of the drawer that the drawee is in funds for its payment, and the subsequent acceptance of such check or bill constitutes an admission of the truth of the representation, which the drawer is not allowed to retract. By such acceptance the drawee admits the truth of the representation, and having obtained a suspension of the holder's remedies against the drawer, and an extension of credit by his admission, is not afterward at liberty to controvert the fact as against a *bona fide* holder for value of the bill. Heuertematte *v.* Morris, 101 N. Y. 63, 70. If the acceptance be for the drawer's accommodation, the acceptor does not thereby become entitled to sue the drawer upon the bill; but when he has paid the bill, and not before, he may recover back the amount from the drawer in an action for money had and received. Christian *v.* Keen, 80 Va. 369, 377. See also Whitwell *v.* Brigham, 19 Pick. 117; Henderson *v.* Thornton, 37 Miss. 448; Suydam *v.* Combs, 3 Green (N. J.), 133.

(*c*) Thus, he would not be permitted to show that the payee at the time of the acceptance was a lunatic. Smith *v.* Marsack, 6 C. B. 486.

§ 63. **When person deemed indorser.** — A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be found* in some other capacity (*a*).

(*a*) See section 17, subdivision 6, and note. There is nothing in either section to preclude a party from assuming liability such as guarantor, etc. Thus, if he were to place above his signature the words, "I guarantee the payment of the within note," he would not be deemed an indorser but a guarantor.

§ 64. **Liability of irregular indorser.**—Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

2. If the instrument is payable to the order of the maker

* Error in engrossing for "bound."

or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

3. If he signs for the accommodation of the payee he is liable to all parties subsequent to the payee.

This section is intended to cover irregular indorsements. On this subject the decisions are very conflicting. In some jurisdictions a person placing his signature on the back of a note before the payee has indorsed was deemed a joint maker. Good *v.* Martin, 95 U. S. 93; National Exchange Bank *v.* Cumberland Lumber Co., 100 Tenn. 479; Logan *v.* Ogden, 101 Tenn. 392; Bank of Jamaica *v.* Jefferson, 92 Tenn. 537; Melton *v.* Brown, 25 Fla. 461; Schroeder *v.* Turner, 68 Md. 506. In other jurisdictions he was regarded as a guarantor. In still others he was considered an indorser. And those courts which held him to be an indorser differed as to whether he was a first or second indorser. The rule adopted in the statute is embodied in part in section 3117 of the Civil Code of California, which reads: "One who indorses a negotiable instrument before it is delivered to the payee is liable to the payee thereon, as an indorser." The California rule was adopted because it is conducive to certainty, and because it appears to accord more nearly with what must have been the intention of the parties. When a plain man puts his signature on the back of a negotiable instrument he ordinarily understands that he is becoming liable as an indorser; and if he puts it there before the instrument is delivered, he usually does so for the purpose of giving the maker or drawer credit with the payee or other person to whom it is negotiated. The following observation in Connors *v.* Taylor (13 Wis. 224, 229) seems to embody much practical good sense: "Obviously, a person indorsing a note before delivery thereof to the payee intends rendering himself liable to the payee in some character and upon some ground. He must intend and design to secure its payment and give credit to the paper by placing his name upon it, even in the hands of the payee." In many of the cases the reasoning is highly technical, and the decisions are based upon considerations which, in all probability, never entered the heads of the parties themselves. The California Code makes no provision for a case where the instrument is drawn to the order of the maker or drawer. This is covered by subdivision 2, above. Subdivision 3 was added to provide for a case where, the payee being unable to enforce payment, there might be a question whether the indorser would be liable to a person claiming under the payee. In New York prior

to the statute a person indorsing in blank before delivery to the payee was *prima facie* deemed to be a second indorser, and hence not liable to the payee, who was supposed to be the first indorser. Bacon *v.* Burnham, 37 N. Y. 614; Phelps *v.* Vischer, 50 N. Y. 69. The same rule prevailed in Pennsylvania. Eilbert *v.* Finkbeiner, 68 Pa. St. 243; Central Nat. Bank *v.* Dreydoppel, 134 Pa. St. 499. And in Oregon. Deering *v.* Creighton, 19 Oregon, 118; Cogswell *v.* Hayden, 5 Oregon, 22. But as the paper itself furnished only *prima facie* evidence of this intention, it was competent to rebut the presumption by parol proof that the indorsement was made to give the maker credit with the payee. Coulter *v.* Richmond, 59 N. Y. 478. As the statute fixes the liability in such cases absolutely, parol evidence would now seem inadmissible. This was held to be the effect of the former statute of Connecticut. (Act of 1884, Gen. Statutes, § 1860) which provided that "Blank indorsements of a negotiable or non-negotiable note, by a person who is neither its maker nor its payee, before or after its indorsement by the payee, shall import the contract of an ordinary indorsement of negotiable paper, as between such indorser and the payee or subsequent holders of such paper." Spencer *v.* Allerton, 60 Conn. 410. But in Kohn *v.* Consolidated Butter & Egg Co., 30 Misc. (N. Y.) 725, it was said by McAdam, J. *obiter:* "The true intention of indorsers, as between themselves, can always be shown by oral evidence. To go further and decide that the statute intended to create an incontestable liability against irregular indorsers would be to impute to the legislative wisdom a design repugnant to every notion of judicial procedure, especially in a provision enacted in the interest of law reform."

ILLUSTRATIONS.

Note made by A payable to order of B, indorsed by C, and afterward delivered to B. C is liable as indorser to B.

Note made by A payable to order of himself, indorsed by B, and afterward delivered to C. B is liable as indorser to C.

Note made by A to order of B, indorsed by C before B, but for accommodation of B, and discounted by Bank of X. C is liable as indorser to Bank of X and not to B.

§ 65. **Warranty where negotiation by delivery, et cetera.**—Every person negotiating an instrument by delivery or by a qualified indorsement, warrants (*a*):

1. That the instrument is genuine (*b*) and in all respects what it purports to be (*c*);

2. That he has a good title to it (*d*);

3. That all prior parties had capacity to contract (*e*);

4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless (*f*).

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision three of this section do not apply to persons negotiating public or corporation securities, other than bills and notes (*g*).

(*a*) This, of course, refers only to the implied warranty. An express warranty may be so framed as to exclude all other warranties which would otherwise be implied by the law. Giffert *v.* West, 37 Wis. 115.

(*b*) Littauer *v.* Goldman, 72 N. Y. 506; Whitney *v.* National Bank of Potsdam, 45 N. Y. 303; Herrick *v.* Whitney, 15 Johns. 240; Canal Bank *v.* Bank of Albany, 1 Hill, 287; Coolidge *v.* Brigham, 5 Metc. 68. But if at the time of the transfer he expressly decline to warrant the genuineness of the instrument no such warranty will be implied. Bell *v.* Dagg, 60 N. Y. 528. But a general refusal to guarantee will not of itself exclude the implied warranty of genuineness. (*Id.*) The sale and transfer, for a full and fair price, of a note past due, indorsed in blank by the person to whose order it is payable, implies a warranty by the vendor that such indorsement is valid. Giffert *v.* West, 37 Wis. 115. The indorsement of a promissory note is a guaranty by the indorser to the indorsee that the prior indorsements on the note and the signature of the payor are genuine, and made by parties authorized to pass the title. McConeghy *v.* Kirk, 68 Pa. St. 200; Condon *v.* Pearce, 43 Md. 83; Lambert *v.* Pack, 1 Salk. 127; Critchlow *v.* Parry, 2 Camp. 182; Prescott Bank *v.* Caverly, 7 Gray, 216, 220. See next section.

(*c*) By the rule of the common law, both in England and in the United States, the doctrine is universally recognized that where commercial paper is sold without indorsement or without express assumption of liability on the paper itself, the contract of sale and the obligations which arise from it, as between vendor and

vendee, are governed by the common law relating to the sale of goods and chattels; and the rule is that in such a sale the obligation of the vendor is not restricted to the mere question of forgery *vel non*, but depends upon whether he has delivered that which he contracted to sell, this rule being designated in England as a condition of the principal contract, as to the essence and substance of the thing to be sold, and in this country being generally termed an implied warranty of the identity of the thing sold. Meyer *v.* Richards, 163 U. S. 385. In this case the decision of the Court of Appeals of New York in Littauer *v.* Goldman, 72 N. Y. 506, is criticised and disapproved. See also Wood *v.* Sheldon, 42 N. J. Law, 425. But there is no implied warranty by the vendor of a bill that it was drawn against funds or that it was not accommodation paper. People's Bank *v.* Bogart, 81 N. Y. 101; *In re* Hammond, 6 De G. M. & G. 699.

(*d*) Meriden National Bank *v.* Gallaudet, 120 N. Y. 298, 303.

(*e*) Littauer *v.* Goldman, 72 N. Y. 506, 509. One who indorses a promissory note, purporting to be executed by a firm, thereby impliedly contracts that the note was made by the firm in whose name it is executed, and he cannot dispute the fact in an action upon the indorsement. Dalrymple *v.* Hillenbrand, 62 N. Y. 5. And a second indorser cannot dispute the legal capacity of the payee to indorse on the ground that she was a married woman. Prescott Bank *v.* Caverly, 7 Gray, 216, 217. So one indorsing the note of a corporation admits its capacity to execute the note. Glidden *v.* Chamberlin, 167 Mass. 486. But see Southern Loan Co. *v.* Morris, 2 Pa. St. 175.

(*f*) Thus, upon the sale of a note there is an implied warranty that it has not been paid. Daskman *v.* Ullman, 74 Wis. 474. Where an instrument void for usury is transferred without indorsement and without representation as to legality, an action cannot be sustained against the vendor without alleging and proving *scienter*. Littauer *v.* Goldman, 72 N. Y. 506. But see Wood *v.* Sheldon, 42 N. J. Law, 425, and Meyer *v.* Richards, 163 U. S. 385. And the same rule applies in a case where the principal debtor has become insolvent. Bicknall *v.* Waterman, 5 R. I. 43; Fenn *v.* Harrison, 3 T. R. 757; Fydell *v.* Clark, 1 Esp. 447. An express warranty that proper measures have been taken to charge the indorser, upon the maker's default, is not inconsistent with an implied warranty that the instrument was originally valid. Gifford *v.* West, 37 Wis. 115.

(*g*) Otis *v.* Cullum, 92 U. S. 448. This was an action against

the vendor of municipal bonds payable to bearer, which were afterward declared void because the legislature had no power to pass the acts under which they were issued. It was held that no recovery could be had in the absence of an express warranty. The application of the rule of commercial paper in such cases would work great hardship and much public inconvenience.

§ 66. **Liability of general indorser.**—Every indorser who indorses without qualification, warrants to all subsequent holders in due course:

1. The matters and things mentioned in subdivisions one, two and three of the next preceding section (*a*); and

2. That the instrument is at the time of his indorsement valid and subsisting (*b*).

And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor (*c*), and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it (*d*).

(*a*) This section makes an important change in the law. In National Park Bank *v.* Seaboard National Bank, 114 N. Y. 28, the Court of Appeals of New York held that where a bank, which had acted merely as a collecting agent, had paid the proceeds of a check over to its principal, the bank making the payment could not recover from the collecting bank upon subsequently discovering that the check had been raised. In this case the check was presented by the Seaboard Bank to the drawee bank through the clearing-house, and hence there was no question as to liability of the Seaboard Bank as an indorser to an indorsee. But in the case of United States *v.* American Exchange National Bank, 70 Fed. Rep. 232, the United States District Court for the Southern District of New York, proceeding upon principles similar to those relied upon in the New York case, held that the indorsement of a bank to which paper has been indorsed for collection does not import a guaranty of the genuineness of all prior indorsements, but only of the agent's relation to the principal as stated upon the face of the paper, and that in such case the collecting bank was not liable after it had paid the proceeds to its principal, though a prior indorsement was

a forgery. But the statute applies to all indorsers who indorse without qualification; and no exception is made of indorsers to whom the instrument has been indorsed restrictively. Hence a bank indorsing paper forwarded for collection is liable in all respects as an indorser, though the prior indorsement was "for collection" or "for deposit," or otherwise restrictive.

(*b*) Thus, whether a promissory note made on the Lord's Day can be enforced by a payee against the maker is immaterial in a suit by the indorsee against the indorser, as the latter always warrants the existence and legality of the contract which he undertakes to assign. Prescott National Bank *v.* Butler, 157 Mass. 548.

(*c*) An indorser of a promissory note which contains a stipulation for a reasonable attorney's fee in case of suit is as much liable for the attorney's fee as for the principal of the note. Benn *v.* Kutzschan, 24 Ore. 28. See sec. 21.

(*d*) The indorser has no right to require the holder to sue the maker or drawer, under the penalty of the indorser being discharged in case of non-compliance; and it is his duty to take up the note. Day *v.* Ridgway, 17 Pa. St. 303. Nor is the holder bound to anticipate and make provision for a breach of the contract. Bartlett *v.* Isbell, 31 Conn. 297. Parol evidence of an agreement which would vary the legal liability of the indorser under his indorsement is inadmissible. Smith *v.* Caro, 9 Ore. 278; Eaton *v.* McMahon, 42 Wis. 484. And while there has been some conflict in the decisions, the sounder doctrine puts all indorsements on substantially the same footing. The contract by a blank indorsement is fixed by law, and should not be rendered uncertain by parol, any more than when written out in full. Charles *v.* Denis, 42 Wis. 56, 58. This is the rule adopted in the statute, which makes the indorser's obligation absolute.

§ 67. Liability of indorser where paper negotiable by delivery.—Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser (*a*).

(*a*) Cover *v.* Myers, 75 Md. 406. The holder of paper payable to bearer and indorsed may sue upon it as bearer or indorsee at his election. Daniel on Negotiable Instruments, section 663*a*; 3 Kent's Comm. 44. In some of the States a note payable to a designated payee or bearer cannot be negotiated except by the indorsement

of such person. See Garvin *v.* Wiswell, 83 Ill. 218; Blackman *v.* Lehman, 63 Ala. 547.

§ 68. **Order in which indorsers are liable.**—As respects one another, indorsers are liable *prima facie* in the order in which they indorse (*a*); but evidence is admissible to show that is* between or among themselves they have agreed otherwise (*b*). Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally (*c*).

(*a*) This rule is general, and applies to accommodation indorsers as well as to others. Such indorsements import, not a joint but a several and successive, liability, each indorser being responsible to all who succeed him. Easterly *v.* Barber, 66 N. Y. 433; Kelly *v.* Burroughs, 102 N. Y. 93; Egbert *v.* Hanson, 34 Misc. 597; McCarty *v.* Roots, 21 How. (U. S.) 432; Bank of U. S. *v.* Beirne, 1 Gratt. 234; Hague *v.* Davis, 8 Gratt. 4; Shaw *v.* Knox, 98 Mass. 214; McDonald *v.* Magruder, 3 Peters, 470; Wood *v.* Repold, 3 Harris & J., 125; Clapp *v.* Rice, 13 Gray, 403; Howe *v.* Merrill, 15 Cush. 88; Talcott *v.* Cogswell, 3 Day, 512; Kirschner *v.* Conklin, 40 Conn. 77, 81; Wolf *v.* Hostetter, 182 Pa. St. 292; Russ *v.* Sadler, 197 Pa. St. 51.

(*b*) Morrison Lumber Co. *v.* Lookout Mt. Hotel Co., 92 Tenn. 6; Bank of Jamaica *v.* Jefferson, 92 Tenn. 537; Reinhart *v.* Schall, 69 Md. 352; Hale *v.* Danforth, 46 Wis. 554; Witherow *v.* Slaybach, 158 N. Y. 649; Patch *v.* Washburn, 82 Mass. 82; Breneman *v.* Furniss, 90 Pa. St. 186. Evidence to show an agreement for a joint liability: Easterly *v.* Barber, 66 N. Y. 433; Phillips *v.* Preston, 5 How. (U. S.) 278; Edelen *v.* White, 6 Bush, 408; *contra:* Johnson *v.* Ramsay, 43 N. J. Law, 279. Evidence to show contract that one was to be prior indorser: Slack *v.* Kirk, 67 Pa. St. 380; Reinhart *v.* Schall, 69 Md. 352; Slagel *v.* Rust, 4 Gratt. 274. The agreement may be evidenced by the circumstances of the case. Macdonald *v.* Whitfield, L. R. 8 App. Cas. 733; Hagerthy *v.* Phillips, 83 Me. 336; Clapp *v.* Rice, 13 Gray, 403. For a case where relief given in equity where order of indorsers changed on renewal of note without consent of one, see Slagel *v.* Rusts' Admr., 6 Gratt. 274.

(*c*) This provision changes the law. Prior to the statute joint payees who indorsed were liable only jointly. Lane *v.* Stacy, 8 Allen, 41; Daniel on Negotiable Instruments, section 704.

* Error in engrossing for "as."

§ 69. **Liability of agent or broker.**—Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section sixty-five of this act, unless he discloses the name of the* principal, and the fact that he is acting only as agent (*a*).

(*a*) Meriden National Bank *v.* Gallaudet, 120 N. Y. 289; Cabot Bank *v.* Morton, 4 Gray, 156; Worthington *v.* Cowles, 12 Mass. 30.

ARTICLE VI.†

Presentment for Payment.

Section 70. Effect of want of demand on principal debtor.
71. Presentment where instrument is not payable on demand.
72. What constitutes a sufficient presentment.
73. Place of presentment.
74. Instrument must be exhibited.
75. Presentment where instrument payable at bank.
76. Presentment where principal debtor is dead.
77. Presentment to persons liable as partners.
78. Presentment to joint debtors.
79. When presentment not required to charge the drawer.
80. When presentment not required to charge the indorser.
81. When delay in making presentment is excused.
82. When presentment may be dispensed with.

* In other States "his" for "the."

† The numbers of the sections of this article in other States than Pennsylvania are as follows: Colorado, Connecticut, District of Columbia, Florida, Massachusetts, North Carolina, North Dakota, Oregon, Tennessee, Utah, Virginia and Washington, 70-88; New York, 130-148; Maryland, 89-107; Rhode Island, 78-96; Wisconsin, 1678-1678-18.

Section 83. When instrument dishonored by non-payment.
84. Liability of person secondarily liable, when instrument dishonored.
85. Time of maturity.
86. Time; how computed.
87. Rule where instrument payable at bank.
88. What constitutes payment in due course.

§ 70. **Effect of want of demand on principal debtor.** —Presentment for payment is not necessary in order to charge the person primarily liable on the instrument* (*a*) but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity (*b*), such ability and willingness are equivalent to a tender of payment upon his part (*c*). But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers (*d*).

(*a*) Howard *v.* Boorman, 17 Wis. 459; Rumball *v.* Ball, 10 Md. 38; Frampton *v.* Coulson, 1 Wils. 33; Norton *v.* Ellam, 2 M. & W. 461; Hills *v.* Place, 48 N. Y. 520; Bush *v.* Gilmore, 45 App. Div. (N. Y.) 89. The action itself is a sufficient demand, and that though the instrument be payable on demand. The rule is general and applies though the maker has made the note for accommodation and this is known to the holder. Hansborough *v.* Gray, 3 Gratt. 340.

(*b*) In New York the words "and has funds there available for that purpose" were added by Laws N. Y. 1898, C. 336. They seem to be superfluous. It is difficult to see how a man can be *able* to pay, unless he has the funds with which to make payment. Besides, if taken literally, they impose a condition not deemed necessary by the courts. If, for example, tho "special place" where the paper is payable is the office of the maker or acceptor, this provision requires that he have the funds there, and it would not be enough

* In the Wisconsin Act all of the first sentence after the words "primarily liable on the instrument" is omitted.

that he have them in bank. The interpolation is not only at variance with the decisions on the subject, but is contrary to good sense, and to the practice of the business world. The change was made upon the suggestion of the Commissioners of Statutory Revision without the knowledge of the Commissioners on Uniformity of Laws. It affords a good illustration of the absurdities likely to result from legislative "tinkering."

(*c*) The rule adopted generally in the United States is that where a note is made payable at a particular bank or other place, or a bill of exchange is drawn or accepted payable in like manner, it is not necessary in order to recover of the maker or acceptor to aver or prove presentment or demand of payment at such place on the day the instrument became due or afterward. The only consequence of a failure to make such presentment is that the maker or acceptor, if he was ready at the time and place to make the payment, may plead the matter in bar of damages and costs. Hills *v.* Place, 48 N. Y. 520, 523; Parker *v.* Stroud, 98 N. Y. 379, 384; Cox *v.* National Bank, 100 U. S. 713; Wallace *v.* McConnell, 13 Peters, 136; Lazier *v.* Horan, 55 Iowa 77; Insurance Company *v.* Wilson, 29 W. Va. 543; Lockwood *v.* Crawford, 18 Conn. 371; Bond *v.* Storrs, 13 Conn. 416.

(*d*) Where a draft is drawn in another State, by one residing there, upon a party residing in this State, any legal question in reference to presentation and demand for payment is to be determined by the laws of this State. Sylvester *v.* Crohan, 138 N. Y. 494; Hibernia Bank *v.* Lacomb, 84 N. Y. 367. The indorser is entitled to demand and notice notwithstanding he holds collateral security. Whitney *v.* Collins, 15 R. I. 44.

§ 71. **Presentment where instrument is not payable on demand.**—Where the instrument is not payable on demand, presentment must be made on the day it falls due (*a*). Where it is payable on demand, presentment must be made within a reasonable time after its issue (*b*), except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

(*a*) As to date of maturity, see section 85.

(*b*) Turner *v.* Iron Chief Mining Co., 74 Wis. 355; Mudds *v.* Harper, 1 Md. 110. This changes the law of New York, which

prior to the statute was, that a promissory note payable on demand with interest is a continuing security, on which an indorser remains liable until an actual demand, and the holder is not chargeable with neglect for omitting to make such demand within any particular time. Merritt *v.* Todd, 23 N. Y. 28; Pardee *v.* Fish, 60 N. Y. 265; Herrick *v.* Wolverton, 41 N. Y. 581; Wheeler *v.* Warner, 47 N. Y. 519; Crim *v.* Starkweather, 88 N. Y. 339; Parker *v.* Stroud, 98 N. Y. 379, 385; Shutts *v.* Fingar, 100 N. Y. 541. The former rule was criticised in some of the later cases. In Connecticut prior to the statute promissory notes payable on demand were required to be presented within four months. Connecticut General Statutes, p. 405. A similar rule exists in California (Civil Code, section 3248), and in Minnesota (Minnesota statutes [1891], section 2104.) In Vermont demand notes are overdue in sixty days. Paine *v.* Central Vermont R. R. Co., 118 U. S. 152. And this was formerly the rule in Massachusetts. (*Id.*) As to a note payable on demand, "with interest semi-annually," see Hayes *v.* Werner, 45 Conn. 252. One of the most difficult questions presented for the decision of a court of law is, what shall be deemed a reasonable time within which to demand payment of the maker of a note payable on demand, in order to charge the indorser. It depends upon so many circumstances to determine what is a reasonable time in a particular case, that one decision goes but little way in establishing a precedent for another. Seaver *v.* Lincoln, 21 Pick. 267. As by section 7 an instrument negotiated when overdue is payable on demand, the requirement of section 71 is applicable in such cases. In theory paper indorsed when overdue is equivalent to a bill of exchange drawn on the party primarily liable, payable at sight. In this theory, the necessity of demand and notice is an essential element: not notice on a given day, as in the case of a maturing note, possible in that case, but impossible in the other, for the day appointed by the former maker and the new acceptor has passed; but notice after the holder has had reasonable time to make the demand on the maker, and has employed that time with diligence. Tyler *v.* Young, 30 Pa. St. 143, 144; Leidy *v.* Tammany, 9 Watts, 353; Guild *v.* Goldsmith, 9 Fla. 212. Where the facts are ascertained the question of what is a reasonable time for demand of payment and notice of dishonor in the case of a note transferred after it has become due is a question of law, depending on the facts of each particular case. Guild *v.* Goldsmith, 9 Fla. 212. In the case of a negotiable certificate of deposit there is much reason for saying that the parties

do not contemplate an immediate demand of payment, and hence an indorsee may not be held to the same degree of diligence in presenting it for payment as the law requires in other cases. Lindsel *v.* McClellan, 18 Wis. 481. As to corporate bonds and coupons, see Williamsport Gas Co. *v.* Pinkerton, 95 Pa. St. 62.

§ 72. **What constitutes a sufficient presentment.**—Presentment for payment, to be sufficient, must be made:

1. By the holder, or by some person authorized to receive payment on his behalf (*a*);

2. At a reasonable hour on a business day (*b*);

3. At a proper place as herein defined (*c*);

4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made (*d*).

(*a*) The mere possession of a negotiable instrument which is payable to the order of the payee, and is indorsed by him in blank, or of a negotiable instrument payable to bearer, is in itself sufficient evidence of the right to present it and to demand payment thereof. Weber *v.* Orton, 91 Mo. 680; Sussex Bank *v.* Baldwin, 2 Harr. (N. J.), 487; Shedd *v.* Brett, 1 Pick. 401. And payment to such person will always be valid, unless he is known to the payer to have acquired possession wrongfully. Daniel on Negotiable Instruments, section 574. There is no need of a power of attorney or written instrument to constitute one an agent for this purpose. Shedd *v.* Brett, 1 Pick. 401. But the mere possession of an instrument payable to order and not indorsed by the payee is not alone sufficient evidence of the authority of an assumed agent to receive payment. Doubleday *v.* Kress, 50 N. Y. 410. Where a bank holding a note for collection sends it for the same purpose to the bank where it is payable, the latter is authorized to demand payment and give notice of dishonor. Blakeslee *v.* Hewett, 16 Wis. 341.

(*b*) Except in cases where the instrument is payable at a bank, the holder has the whole day in which to present the same, the only limitation being that he must present it at a reasonable hour, and this may depend upon the circumstances of the case. Salt Springs National Bank *v.* Burton, 58 N. Y. 430; Farnsworth *v.* Allen, 4 Gray, 453; Barclay *v.* Bailey, 2 Camp. 527; Wilkins *v.* Jadis, 2 B. & Ad. 188. As late as nine o'clock in the evening has been held

to be a reasonable hour. Farnsworth *v.* Allen, 4 Gray, 453. But it is only when presentment is at the residence that the time is extended into the hours of rest. If it is at the place of business it must be during those business hours when such places are customarily open, or, at least, while some one is there competent to give an answer. Waring *v.* Betts, 90 Va. 46, 53. As to when instruments payable at bank must be presented, see section 75.

(*c*) See next section.

(*d*) Cromwell *v.* Hynson, 2 Camp. 596; Phillips *v.* Astberg, 2 Taunt. 206.

§ 73. **Place of presentment.** — Presentment for payment is made at the proper place.

1. Where a place of payment is specified in the instrument and it is there presented;

2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;

3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment (*a*).

4. In any other* case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence (*b*).

(*a*) Gates *v.* Beecher, 60 N. Y. 518, 522; Holtz *v.* Boppe, 37 N. Y. 634. A presentment at the maker's usual place of business during business hours, there being no one there to answer, is a sufficient demand to charge the indorser; for the maker is bound to have a suitable person there to answer inquiries, and pay his notes, if there demanded. Baumgardner *v.* Reeves, 35 Pa. St. 250. Wallace *v.* Crilly, 46 Wis. 577. And presentment at such place is sufficient, though it be closed, there being no explanation furnished as to why it is closed. Sulsbacker *v.* Bank of Charleston, 86 Tenn. 201. If, however, the party has abandoned his place of business at the maturity of the paper, but has a residence or other place of business in the city, which could be ascertained by reasonable inquiry, a presentment at the former place of business would not be sufficient.

* The word "other" omitted from the New York statute of 1897 through mistake supplied by Laws N. Y. 1898, c. 336.

(*Id.*) The making and dating of a promissory note at a particular place is not equivalent to making it payable there, nor does it supercede the necessity for presentment and demand at the residence or place of business of the maker if it be known, or if by due diligence in making inquiry it could be ascertained. Oxnard *v.* Varnum, 111 Pa. St. 193. But where a bill of exchange is addressed to the drawee at a particular house, and the same is accepted generally by him, the address indicates the place where it is to be presented for payment, and a presentment there is sufficient as against the drawee and indorsers. Pierce *v.* Struthers, 27 Pa. St. 249, 254; Struthers *v.* Blake *et al.*, 30 Pa. St. 139. Where a note is dated at a particular place, and no other place is designated as that of its negotiation and payment, the presumption is that the maker resides where the note is dated, and that he contemplates payment at that place. Sasscer *v.* Stone, 10 Md. 98; Ricketts *v.* Pendleton, 14 Md. 320; Nailor *v.* Bowie, 3 Md. 251; Clark *v.* Seabright, 135 Pa. St. 173. But this is presumption only, and if he resides elsewhere within the State when the note falls due, and this is known to the holder, demand must be made at the maker's residence or place of business. Sasscer *v.* Stone, 10 Md. 98. When the maker does not reside, and has no place of business, in the State where the note is payable, no demand upon him is necessary in order to charge the indorser. Ricketts *v.* Pendleton, 14 Md. 320. And if the maker absconds, this will generally excuse the demand; but if he changes his residence within the same jurisdiction, the holder must endeavor to find it and make demand there. Nailor *v.* Bowie, 3 Md. 251. But where the maker or acceptor waives presentment at his place of business or residence, presentment elsewhere may be sufficient. King *v.* Holmes, 11 Pa. St. 456; Parker *v.* Kellogg, 158 Mass. 90.

(*b*) If the maker leaves the State subsequent to the making of the note, presentment at his former place of business or residence is sufficient. Nailor *v.* Bowie, 3 Md. 251.

§ 74. **Instrument must be exhibited.**—The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it (*a*).

(*a*) Ocean Nat. Bank *v.* Fant, 50 N. Y. 474, 476; Smith *v.* Rockwell, 2 Hill, 482; Musson *v.* Lake, 4 How. 262; Freeman *v.*

Boynton, 7 Mass. 483; Draper *v.* Clemens, 7 Mo. 52. This is requisite in order that the drawer or acceptor may be able to judge (1) of the genuineness of the instrument; (2) of the right of the holder to receive payment; and (3) that he may immediately reclaim possession upon paying the amount. Waring *v.* Betts, 90 Va. 46, 51. Demand of payment without actual exhibition of the note is sufficient to bind the indorser where the maker does not demand to see the note but refuses payment on other grounds. Legg *v.* Viman, 165 Mass. 555; Waring *v.* Betts, 90 Va. 46; Lockwood *v.* Crawford, 18 Conn. 361; Fall River Union Bank *v.* Willard, 5 Metcalf, 216. Where the note is secured by collaterals the maker is entitled to require that they be delivered with the note; and if he insists upon it, they must be tendered with the note or the demand of payment will not be sufficient. Ocean Nat. Bank *v.* Faut, 50 N. Y. 474.

§ 75. **Presentment where instrument payable at bank.**—Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient (*a*).

(*a*) See Salt Springs National Bank *v.* Burton, 58 N. Y. 430; Bank of Syracuse *v.* Hollister, 17 N. Y. 46; Bank of Utica *v.* Smith, 18 Johns. 230; Parker *v.* Gordon, 7 East. 387; Garnett *v.* Woodcock, 1 Starkie, 475; Reed *v.* Wilson, 41 N. J. Law, 29; Waring *v.* Betts, 90 Va. 46; Shepard *v.* Chamberlain, 8 Gray, 225. The authorities are not agreed upon the point as to the precise time when suit may be brought on a dishonored note payable at a bank, some holding that it cannot be brought until the day after its dishonor, others that it may be brought at any time after the expiration of business hours on the day it is payable, and others still that it may be commenced as soon as payment is refused on that day. Citizens' Bank *v.* Lay, 80 Va. 436, 440; Church *v.* Clark, 21 Pick. 309; Blackman *v.* Nearing, 43 Conn. 60; Humphreys *v.* Sutcliffe, 192 Pa. St. 336. If a note held by a bank at which it is payable is not paid when due, no presentment and demand of payment are necessary. Dykman *v.* Northridge, 1 App. Div. (N. Y.) 26. It is sufficient that the note was in the bank on the day it fell due,

and that there were no funds of the maker there, or other provision for payment. Hallowell *v.* Curry, 41 Pa. St. 322. Where a national bank has been placed in the hands of a receiver, paper payable at the bank should be presented at the office of the receiver. Hutchison *v.* Crutcher, 98 Tenn. 421. And presentment there is not excused because he has removed his office and the assets of the bank to another building in the same place. (*Id.*) But see Berg *v.* Abbott, 83 Pa. St. 177. It has been held that the office of a private banker is not a bank within the terms of a note made payable at "any bank in Boston." Way *v.* Butterworth, 108 Mass. 509. As to bank customs see Grand Bank *v.* Blanchard, 23 Pick. 305, 306; Mechanics' Bank *v.* Merchants' Bank, 6 Metc. 13, 24; Boston Bank *v.* Hodges, 9 Pick. 420; People's Bank *v.* Keech, 26 Md. 521. But now that the statute prescribes the rules as to presentment these matters can no longer be governed by custom; certainly not if the custom conflicts with the statute.

§ 76. **Presentment where principal debtor is dead.** —Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence, he can be found (*a*).

(*a*) But there must be competent and legal proof of his death, and that the party upon whom the demand was made was such representative; the statement of these facts in the protest is not *prima facie* proof thereof. Weems *v.* Farmers' Bank, 15 Md. 231.

§ 77. **Presentment to persons liable as partners.**— Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm (*a*).

(*a*) Gates *v.* Beecher, 60 N. Y. 518; Cayuga County Bank *v.* Hunt, 2 Hill, 635; Crowley *v.* Barry, 4 Gill, 194; Fourth Nat. Bank *v.* Henschuk, 52. Mo. 207.

§ 78. **Presentment to joint debtors.**—Where there are several persons not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all (*a*).

(*a*) Gates *v.* Beecher, 60 N. Y. 518, 523; Union Bank *v.* Willis, 8 Mete. 504; Arnold *v.* Dresser, 8 Allen, 435; Willis *v.* Green, 5 Hill, 232; Benedict *v.* Schmieg, 13 Wash. 476. In some cases this might be impracticable, but such cases are covered by section 82.

§ 79. **When presentment not required to charge the drawer.**—Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument (*a*).

(*a*) But presentment is not dispensed with merely because the drawer has no funds in the hands of the drawee. Life Insurance Company *v.* Pendleton, 112 U. S. 708; Dickens *v.* Beal, 10 Pet. 572; Welch *v.* B. C. Taylor Mfg. Co., 82 Ill. 581; Kimball *v.* Bryan, 56 Iowa, 632; Kinsley *v.* Robinson, 21 Pick. 327. It is sufficient if the drawer had a reasonable expectation that the bill would be paid; or if there was an agreement between him and the drawee that the latter should accept, or a course of dealing between them by which the drawee was accustomed to accept without reference to the state of the mutual accounts. See cases cited above. Presentment of a check is excused where the making of the check was a fraud upon the part of the drawer, he having no funds in the bank, and no ground for a reasonable expectation that it would be paid. Beauregard *v.* Knowlton, 156 Mass. 395, 396.

§ 80. **When presentment not required to charge the indorser.**—Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented.

§ 81. **When delay in making presentment is excused.**—Delay in making presentment for payment is

excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence (*a*). When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

(*a*) Windham Bank *v.* Norton, 22 Conn. 213; Pier *v.* Heinrichsoffen, 67 Mo. 163. In these cases the delay was caused by miscarriage in the mail. See section 105. Sickness of the holder of the note is not an excuse for the failure to present it at the proper time, unless it was not only sudden, but so severe as not only to prevent him from making the presentment and giving notice of non-payment himself, but from employing another person to do it; and then it must be shown that the proper steps were taken as soon as the disability was removed. Wilson *v.* Senier, 14 Wis. 380. Where the facts are not disputed the question of due diligence is one of law for the court; but if there is a dispute as to the facts, the question is for the jury. Belden *v.* Lamb, 17 Conn. 451.

§ 82. **When presentment may be dispensed with.**— Presentment for payment is dispensed with:

1. Where after the exercise of reasonable diligence presentment as required by this act cannot be made (*a*);

2. Where the drawee is a fictitious person;

3. By waiver of presentment express or implied (*b*).

(*a*) The burden is upon the plaintiff to show that due diligence was used. Eaton *v.* McMahon, 42 Wis. 484. It is the duty of a holder to give the notary information as to the residence of the drawer and indorser; and if this is unknown to the holder, he must inquire of those whose names are upon the note or bill as to the residence which he does not know. If there are none such, he must use due diligence to ascertain them. It will not do for the holder to put the note or bill in the hands of the notary at the place where it was drawn without furnishing him any information as to the residence of the maker, or that of the indorser, and then for the notary, without inquiry from him, to return the note without demand or notice. The holder is the one most likely of all persons to know the place of residence of those to whom he

looks for payment, and due diligence requires that he should give the information to his agent, whom he employs to make demand from the maker and give notice to the indorser; or, if he neglects to do so, that the agent should inquire of him where the parties reside. Smith *v.* Fisher, 24 Pa. St. 222. When the facts are undisputed, the question of diligence is for the court. Smith *v.* Fisher, 24 Pa. St. 222; Wheeler *v.* Field, 6 Mete. 290. Presentment is not dispensed with by the insolvency of the maker or drawee. Rienke *v.* Wright (Wis.), 67 N. W. Rep. 737; Hawley *v.* Jette, 10 Oregon 31; Bensonhurst *v.* Wilby, 45 Ohio St. 340; Jackson *v.* Richards, 2 Caines, 343; Armstrong *v.* Thurston, 11 Md. 148.

(*b*) The waiver may be made either during the currency of the note or after its maturity. Power *v.* Mitchell, 7 Wis. 161. It may be made either verbally or in writing. Smith *v.* Lownsdale, 6 Oregon 78. Nor is it necessary that the waiver should be direct and positive. It may result from implication and usage, or from any understanding between the parties which is of a character to satisfy the mind that a waiver is intended. Cady *v.* Bradshaw, 116 N. Y. 188, 191. The assent must be clearly established, however, and will not be inferred from doubtful or equivocal acts or language. Ross *v.* Hurd, 71 N. Y. 14. But any language calculated to induce the holder not to make demand or protest is sufficient. Moyer & Brothers' Appeal, 87 Pa. 129; Boyd *v.* Bank of Toledo, 32 Ohio St., 526. Where the indorser requests the holder to extend the time of payment and promises to let his name remain on the instrument, this will amount to a waiver of presentment and notice of non-payment. Cady *v.* Bradshaw, 116 N. Y. 188, 191, 192. So a telegram sent to the collecting bank requesting it to pay the note and save protest and draw on, in reply to an inquiry made of the firm by such bank, is a sufficient waiver. Seldner *v.* Mount Jackson National Bank, 66 Md. 488. So where an indorser admits his liability at the time of the maturity of the note and accompanies such admission with an offer to "arrange the matter" with the holders, and thereafter by his conduct shows that he regards himself as liable, and asks for indulgence. Moyer & Brothers' Appeal, 87 Pa. St. 129. So where a note is a short time before the day of its maturity, presented to an indorser, and the latter then promises that if the note is suffered to run he will pay it whenever payment is called for. Hale *v.* Danforth, 46 Wis. 554. And so, where, in response to inquiry by the holder, the indorser told him that it would be of no

use to call upon the maker. Barker *v.* Parker, 6 Pick. 80. A waiver of the right to notice does not excuse demand of payment. Berkshire Bank *v.* Jones, 6 Mass. 524; Low *v.* Howard, 11 Cush. 268, 270. An agreement to waive demand and notice is not within the statute of frauds; it is not a new contract, but only a waiver absolutely or in part of a condition precedent to liability. Taunton Bank *v.* Richardson, 5 Pick. 436; Barclay *v.* Weaver, 19 Penn. State R. 396; Power *v.* Mitchell, 7 Wis. 159, 166. As to waiver where the maker has transferred all his property to the indorsee, see Brandt *v.* Mickle, 26 Md. 436; Mechanics' Bank *v.* Griswold, 7 Wend. 165; Moore *v.* Alexander, 63 App. Div. (N. Y.) 100; Brown *v.* Maffey, 15 East 222; Bond *v.* Farnham, 5 Mass. 170.

§ 83. **When instrument dishonored by non-payment.**—The instrument is dishonored by non-payment when:

1. It is duly presented for payment and payment is refused or cannot be obtained; or

2. Presentment is excused and the instrument is overdue and unpaid.

§ 84. **Liability of person secondarily liable, when instrument dishonored.**—Subject to the provisions of this act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon, accrues to the holder (*a*).

(*a*) When the indorser's liability has been fixed by demand and notice of dishonor, he becomes an independent and principal debtor, and does not stand in the position of a mere surety. German-American Bank *v.* Niagara Cycle Co., 13 App. Div. 450; First Nat. Bank *v.* Wood, 71 N. Y. 405, 411. Though the holder has received collateral from the maker, the law implies no contract to proceed on the collaterals before suing the indorser. Buck *v.* Freehold Bank, 37 N. J. Law, 307. The section does not change the law as to conditional guaranties, as, for example, a guaranty of the collectibility of the instrument, in which case there is no right of recourse against the guarantor until the holder has first made proper effort to collect from the principal debtor. Cowles *v.* Peck, 55 Conn. 251; Summers *v.* Barrett, 65 Iowa 292; for in such case the terms of the express contract exclude the idea of an intention to incur the liability prescribed by the statute.

§ 85. **Time of maturity.**—Every negotiable instrument is payable at the time fixed therein without grace (*a*). When the day of maturity falls upon Sunday or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due* on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday (*b*).

(*a*) Besides the States in which the Negotiable Instruments Law has been adopted, days of grace have been abolished in the following States: California, Idaho, Illinois, Maine, Montana, New Jersey, Vermont.

(*b*) Laws of Mass. March 30, 1895, May 28, 1895; Laws of Maine, 1897, Ch. 259; Laws of New York, 1887, Ch. 289, Ch. 461; Laws of Penn. May 31, 1893; Laws of U. S. Feb. 18, 1893; Laws of N. J. 1895, Ch. 43. In the Wisconsin Act all after the second sentence is omitted. In the Colorado Act the following is substituted for the third sentence: "Instruments falling due on any day, in any place where any part of such day is a holiday, are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment during reasonable hours of the part of such day which is not a holiday." In the North Carolina Act a provision (Sec. 197) is added as follows: "The laws now in force in this State with regard to days of grace shall remain in force and shall not be construed to be repealed by this act." In Massachusetts the amendatory act (Laws 1899, c. 130) provides: "On all drafts and bills of exchange made payable within this Commonwealth at sight three days of grace shall be allowed, unless there is an express stipulation therefor to the contrary." See p. 149.

§ 86. **Time; how computed.**—Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is

* In New York the words "or becoming payable" were added by Laws N. Y. 1898, c. 336. They are not in the statute in the other States.

determined by excluding the day from which the time is to begin to run, and by including the date of payment (*a*).

(*a*) See New York Statutory Construction Law, sections 26, 27.

§ 87. **Rule where instrument payable at bank.**— Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon (*a*).

(*a*) There is some conflict in the decisions as to the authority of a bank to pay a note or acceptance made payable there. The rule adopted in the statute is the one sustained by the weight of authority; and is also the rule which is most convenient in practice. It is supported by the following decisions: Ætna Nat. Bank *v.* Fourth Nat. Bank, 46 N. Y. 82; Commercial Bank *v.* Hughes, 17 Wend. 94; Commercial Nat. Bank. *v.* Henninger, 105 Pa. St. 496; Bedford Bank *v.* Acoarn, 125 Ind. 582; Home Nat. Bank *v.* Newton, 8 Bradwell, 563; *contra:* Grissom *v.* Commercial Bank, 87 Tenn. 350. In Pennsylvania it is held that where a bank is the holder of a note payable at the banking house, and upon its maturity the maker has a cash deposit in such bank exceeding the amount of the note, which deposit is not specially applicable to a particular purpose, the bank is bound to charge up the amount of the note against the deposit. In such cases the note is in effect a draft on the bank in favor of the holder, and in discharge of the indorser. German National Bank *v.* Foreman, 138 Pa. St. 474, 479. Commercial National Bank *v.* Henninger, 105 Pa. 496 But it is also held in that State that while a bank which has discounted a promissory note may appropriate to the payment of the note funds in its hands belonging to any party to the note, when payment is not made at the time and place named, yet it is not bound to do so as to any party except the maker. Mechanics' and Traders' Bank *v.* Seitz, 150 Pa. St. 632.

§ 88. **What constitutes payment in due course.**— Payment is made in due course when it is made at or after the maturity of the instrument (*a*) to the holder (*b*) thereof in good faith and without notice that his title is defective.

(*a*) Payment before the day is a defense which binds only the

party receiving payment and those who stand in his shoes. Watson *v.* Wyman, 161 Mass. 96, 99.

(*b*) It is the duty of the maker to see that the payee has it in possession, and to take it up when he pays it. Adair *v.* Lenox, 15 Oregon 489. The rule is that if a bill be paid at maturity, in full, by the acceptor, or other party liable, to a person having a legal title in himself by indorsement, and having the custody and possession of the bill ready to surrender, and the party paying has no notice of any defect of title or authority to receive, the payment will be good. But if upon such payment the holder has not the actual possession of the bill ready to be delivered, and does not in fact surrender it, but gives a receipt or other evidence of the payment, and it turns out that the party thus receiving had not a good right and lawful authority to receive and collect the money, but that another person has such right, the payment will not discharge the party paying, but will be a payment in his own wrong. Wheeler *v.* Guild, 20 Pick. 545, 553; Trustees of the I. I. Funds *v.* Lewis, 34 Fla. 424, 428. And payment made to the original holder, after indorsement and delivery of the paper even as collateral security, is no defense to a suit on the note by the indorsee, although the payment was made by the maker without notice or knowledge of the transfer. Gosling *v.* Griffin, 85 Tenn. 737. But while a person not in the actual possession of negotiable paper is presumed from that fact alone to have no authority to receive payment thereon, yet such presumption may be rebutted and overcome by evidence showing actual authority. Swengle *v.* Wells, 7 Ore. 222.

ARTICLE VII.*

Notice of Dishonor.

Section 89. To whom notice of dishonor must be given.
90. By whom given.
91. Notice given by agent.

* The numbers of the sections of this article in other States than Pennsylvania are as follows: Colorado, Connecticut, District of Columbia, Florida, Massachusetts, North Carolina, North Dakota, Oregon, Tennessee, Utah, Virginia and Washington, 89-118; New York, 160-189; Maryland, 108-137; Rhode Island, 97-126; Wisconsin, 1678-48.

Section 92. Effect of notice given on behalf of holder.
93. Effect where notice is given by party entitled thereto.
94. When agent may give notice.
95. When notice sufficient.
96. Form of notice.
97. To whom notice may be given.
98. Notice where party is dead.
99. Notice to partners.
100. Notice to persons jointly liable.
101. Notice to bankrupt.
102. Time within which notice must be given.
103. Where parties reside in same place.
104. Where parties reside in different places.
105. When sender deemed to have given due notice.
106. Deposit in post-office, what constitutes.
107. Notice to subsequent parties, time of.
108. Where notice must be sent.
109. Waiver of notice.
110. Whom affected by waiver.
111. Waiver of protest.
112. When notice dispensed with.
113. Delay in giving notice; how excused.
114. When notice need not be given to drawer.
115. When notice need not be given to indorser.
116. Notice of non-payment where acceptance refused.
117. Effect of omission to give notice of non-acceptance.
118. When protest need not be made; when must be made.

§ 89. **To whom notice of dishonor must be given.**— Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and

to each indorser, and any drawer or indorser to whom such notice is not given is discharged (*a*).

(*a*) This rule does not apply to guarantors. Brown *v.* Curtiss, 2 N. Y. 225; Allen *v.* Rightmere, 20 Johns. 365; Breed *v.* Hillhouse, 7 Conn. 523; Roberts *v.* Hawkins, 70 Mich. 566; Hungerford *v.* O'Brien, 37 Minn. 306. And proceedings against the maker are necessary only where there is a guaranty of collection. Brown *v.* Curtiss, *supra*. The burden of proving that due notice was given is on the holder. Marks *v.* Boone, 24 Fla. 177.

§ 90. **By whom given.**—The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given (*a*).

(*a*) It was once held that no party could give a valid notice unless he was the holder at the time. Tindal *v.* Brown, 1 Term Rep. 167. But this doctrine, after having been followed in other cases (*ex parte* Barclay, 7 Ves., 597; Stewart *v.* Kennett, 2 Camp., 177), was expressly overruled in the case of Chapman *v.* Keane (3 Adol. & Ellis, 193), in which most of the previous decisions were reviewed. But notice by a stranger is not sufficient. Lawrence *v.* Miller, 16 N. Y. 235, 237; Chanoine *v.* Fowler, 3 Wend. 173; Brailsford *v.* Williams, 15 Md. 151. And a party who has been discharged by laches, and cannot in any event bring an action on the instrument, is deemed a stranger for this purpose. Harrison *v.* Ruscoe, 15 L. J. Exch. 110; 15 M. & W. 231. A drawee who refuses acceptance cannot give notice. Stanton *v.* Blossom, 14 Mass. 116.

§ 91. **Notice given by agent.**—Notice of dishonor may be given by an agent either in his own name (*a*) or in the name of any party entitled to give notice, whether that party be his principal or not (*b*).

(*a*) Drexler *v.* McGlynn, 99 Cal. 143. But a notice made out by a notary public and signed by mistake with the name of the maker of the note instead of with his own name, without the authority of the maker, is insufficient. Cabot Bank *v.* Warner, 92 Mass. 522.

(*b*) Banks as agents for collection have authority to receive and transmit notices on behalf of the owners of the paper. West River Bank *v.* Taylor, 34 N. Y. 128, 130; Colt *v.* Noble, 5 Mass. 167; Haynes *v.* Birks, 3 Bor. & Pul. 599; Robson *v.* Bennett, 2 Taunt. 388. An agent in giving notice represents and acts on behalf of his principal, and this, though he may be a notary and act in his official character. Lawrence *v.* Miller, 16 N. Y. 235, 238.

§ 92. **Effect of notice given on behalf of holder.**— Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given (*a*).

(*a*) But the holder is not bound to give notice to any one but his immediate indorser. West River Bank *v.* Taylor, 34 N. Y. 128, 131; Linn *v.* Horton, 17 Wis. 150, 153.

§ 93. **Effect where notice is given by party entitled thereto.** — Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom such notice is given.

§ 94. **When agent may give notice.**—Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon the receipt of such notice,* himself the same for giving notice as if the agent had been an independent holder (*a*).

(*a*) Rosson *v.* Carroll, 90 Tenn. 90.

* The word "has" omitted in Pennsylvania statute through error in engrossing.

§ 95. **When notice sufficient.**—A written notice need not be signed (*a*), and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby (*b*).

(*a*) See Bank *v.* Dibrell, 91 Tenn. 301; Spann *v.* Baltzell, 1 Fla. 301; Kilgore *v.* Bulkley, 14 Conn. 362; Tobey *v.* Lenning, 14 Pa. St. 483.

(*b*) Aiken *v.* Marine Bank, 16 Wis. 679. Where the instrument is misdescribed, the fact that there is no other instrument to which the notice could be applied may be shown by extrinsic evidence. Cayuga County Bank *v.* Worden, 6 N. Y. 19.

§ 96. **Form of notice.**—The notice may be in writing or merely oral, and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment (*a*). It may in all cases be given by delivering it personally or through the mails (*b*).

(*a*) Sasscer *v.* Farmers' Bank, 4 Md. 409; Brewster *v.* Arnold, 1 Wis. 264. A notice which omits an essential feature of the note, or misdescribes it, is an imperfect one, but not necessarily invalid. It is invalid only where it fails to give that particular information which it would have given but for its particular imperfection; and even in case the notice in itself be defective, if, from evidence *aliunde* of the attendant circumstances, it is apparent that the indorser was not deceived or misled as to the identity of the dishonored instrument, he will be charged. Hodges *v.* Schuler, 22 N. Y. 114; Artisans' Bank *v.* Backus, 36 N. Y. 106; Gill *v.* Palmer, 29 Conn. 57; Howland *v.* Adrian, 29 N. J. Law, 48. To make the notice defective the variance must be such as that, under the circumstances of the case, it conveys no sufficient knowledge to the indorser of the identity of the particular instrument which has been dishonored. Cayuga County Bank *v.* Worden, 1 N. Y. 413, 417; Mills *v.* Bank of U. S., 11 Wheat. 431; Bank of Alexandria *v.* Swaim, 9 Peters, 33. The notice is not necessarily defective because it is silent as to the date and time of payment, Youngs *v.*

Lee, 12 N. Y. 551, or fails to state that demand of payment was made, Mills *v.* Bank of U. S., 11 Wheat. 431, or does not state at whose request it is given, nor who is the owner of the note. Shed *v.* Brett, 1 Pick. 401. The term "protested" when contained in a notice, with the statement that the holder looks to the indorser for indemnity, fairly and necessarily implies that the note or bill has been dishonored. Brewster *v.* Arnold, 1 Wis. 264. A note is well described when its maker, payee, date, amount, and time of payment are stated. A printed notice is sufficient, Cuyler *v.* Stevens, 4 Wend. 566; Bank of Cooperstown *v.* Woods, 28 N. Y. 545, and the signature of the notary need not be in writing, but may be printed. Bank of Cooperstown *v.* Woods, 28 N. Y. 561; Sussex Bank *v.* Baldwin, 2 Harr. (N. J.), 487. But a notice which is barely enough to put the indorser upon inquiry is not sufficient. Cook *v.* Litchfield, 9 N. Y. 279, 281. It must reasonably apprise the party of the particular paper upon which he is sought to be charged. Home Insurance Co. *v.* Green, 19 N. Y. 518; Dodson *v.* Taylor, 56 N. J. Law, 11. In the New York case cited the name of the maker was left blank, and it was held that the notice was not sufficient. Notice that a note is unpaid would not necessarily imply that it is dishonored, because the note might remain unpaid, while in fact it may never have been presented to the maker for payment. Hunter *v.* Van Bomhorst, 1 Md. 504, 510. But such notice might be good if the note is payable at a bank. *Id.* If the notice indicates that the paper was presented before due, it is not sufficient. Etting *v.* Schuylkill Bank, 2 Pa. St. 355. The statement that the holder looks for payment to the party to whom notice is sent is not necessary; for this is implied from the fact of giving notice. Bank of U. S. *v.* Carneal, 2 Peters, 543; Mills *v.* Bank, 11 Wheat. 431, 436; Nelson *v.* First Nat. Bank, 29 U. S. App. 554; 69 Fed. Rep. 798, 801; 16 C. C. A. 425; Cowles *v.* Horton, 3 Conn. 523. Where there is no dispute as to the facts, the question of the sufficiency of the notice is a question of law for the court. Cayuga County Bank *v.* Worden, 6 N. Y. 19.

(*b*) The rule of the commercial law was well settled that if the parties resided in the same place the notice must be personal; that is, must be given to the individual or left at his domicile or place of business. Sheldon *v.* Benham, 4 Hill, 129; Brown *v.* Bank of Abingdon, 85 Va. 95; Boyd's Admr. *v.* City Savings Bank, 15 Gratt. 501, 505; Bell *v.* Hagerstown Bank, 7 Gill, 216; Westfall *v.* Farwell, 13 Wis. 504, 509. But the courts have been inclined to restrict the general rule, and established many exceptions to it. Bank of

Columbia *v.* Lawrence, 1 Peters, 578. In the notes to 1 American Lead. Cas. (402) it is said: "It is obvious that the rule requiring personal notice, where the parties reside in the same place, has lost its reasonable force and exists only by authority. Instead of undermining it by exceptions that conflict with it in principle and render the subject embarrassing in practice, it would be much better to declare that the rule itself has become obsolete and is abolished." But it cannot properly be said that the rule had become obsolete, having been recognized and acted on in many recent as well as older cases, and having in no case been denied or disregarded. It was, therefore, too firmly established to be abolished by the courts. See Boyd's Admr. *v.* City Savings Bank, 15 Gratt. 501, 505. In New York, service by mail in such cases was authorized by Laws 1857, Chap. 416. For the construction of the former statute of Wisconsin see Smith *v.* Hill, 6 Wis. 154; Westfall *v.* Farwell, 13 Wis. 504.

§ 97. **To whom notice may be given.**—Notice of dishonor may be given either to the party himself or to his agent in that behalf (*a*).

(*a*) Fassin *v.* Hubbard, 55 N. Y. 465, 471; Lake Shore National Bank *v.* Butler Colliery Co., 51 Hun, 63, 68. In Firth *v.* Thrush, 8 Barn. & Cress. 387, the opinion was expressed that authority to indorse negotiable paper carried with it authority to receive notice of its dishonor. And in Persons *v.* Kruger, 45 App. Div. 187, it was held that a notice of protest may be served upon an agent of the payee and indorser, where the agent has authority to make and indorse paper, and has authority to act and has acted as the general agent of the payee in the conduct of his business, and has had full charge of the acts and dealings with the bank at which the paper was discounted and the management of the paper. A notice of nonpayment sent to the indorser inclosed under seal and delivered by the messenger to one in the employment of the indorser, with directions not to open it, is insufficient. Paine *v.* Edsell, 19 Pa. St. 178.

§ 98. **Notice where party is dead.**—When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found (*a*).

If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased (*b*).

(*a*) Denninger *v.* Miller, 7 App. Div. 409; Bank of Port Jefferson *v.* Darling, 91 Hun, 236; Shoenberger's Executor *v.* Lancaster Savings Institution, 28 Pa. St. 459; Dodson *v.* Taylor, 56 N. J. Law, 11; Massachusetts Bank *v.* Oliver, 10 Cush. 557; Merchants' Bank *v.* Birch, 17 Johns. 24. See also Boyd's Admr. *v.* City Savings Bank, 15 Gratt. 501; Smalley *v.* Wright, 40 N. J. Law, 471; Goodnow *v.* Warren, 122 Mass. 82; Bealls *v.* Peck, 12 Barb. 245; Cayuga Co. Bank *v.* Bennett, 5 Hill, 236; Maspero *v.* Pedesclaux, 22 La. Ann. 227.

(*b*) Goodnow *v.* Warren, 122 Mass. 82; Merchants' Bank *v.* Birch, 17 Johns. 25; Lindeman's Exr. *v.* Guildin, 34 Pa. St. 54.

§ 99. **Notice to partners.**—Where the parties to be notified are partners, notice to any one partner is notice to the firm (*a*), even though there has been a dissolution (*b*).

(*a*) But where partners give a promissory note with one of them as maker and the other as indorser, the latter is not liable on his indorsement unless he be duly notified of the dishonor of the note. Foland *v.* Boyd, 23 Pa. St. 476.

(*b*) Hubbard *v.* Matthews, 54 N. Y. 43, 50; Coster *v.* Thomason, 19 Ala. 717; Slocomb *v.* Lizardi, 21 La. Ann. 355; Fourth Nat. Bank *v.* Henschuh, 52 Mo. 207; Seldner *v.* Mount Jackson Nat. Bank, 66 Md. 488.

§ 100. **Notice to persons jointly liable.**—Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others (*a*).

(*a*) Shepard *v.* Hawley, 1 Conn. 367; Boyd *v.* Orton, 16 Wis. 495. For the distinction between parties who are partners and joint parties not partners, see Gates *v.* Beecher, 60 N. Y. 518, 526. See also Willis *v.* Green, 5 Hill, 232. But see Sherer *v.* Easton Bank, 33 Pa. St. 134; Jarnigan *v.* Stratton, 95 Tenn. 619.

§ 101. **Notice to bankrupt.** — Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee (*a*).

(*a*) In Callahan *v.* Kentucky Bank, 82 Ky. 231, it was decided that where the indorser had made a voluntary assignment for the benefit of creditors, notice to the assignee would bind the indorser and his estate. And a similar rule was adopted by the Supreme Court of Tennessee in American Nat. Bank *v.* Junk Bros., 94 Tenn. 634. On the other hand, the Supreme Court of Ohio, in House *v.* Vinton, 43 Ohio St. R., 346, by a majority opinion, declined to adopt this rule, making a distinction between an assignee under a voluntary general assignment and an assignee in bankruptcy. In this latter case, however, there is a strong dissenting opinion by two of the judges of that court, in which the soundness of the rule as announced by the Kentucky court is earnestly insisted upon.

§ 102. **Time within which notice must be given.**— Notice may be given as soon as the instrument is dishonored (*a*); and unless delay is excused as hereinafter provided, must be given within the times fixed by this act.

(*a*) The holder need not wait until the close of business hours, but may send notice at once. Bank of Alexandria *v.* Swan, 9 Peters, 33; Lenox *v.* Roberts, 2 Wheat. 373; *ex parte* Moline, 19 Ves. 216; Whitwell *v.* Brigham, 19 Pick. 117; Coleman *v.* Carpenter, 9 Pa. St. 178.

§ 103. **Where parties reside in same place.**—Where the person giving and the person to receive notice resides* in the same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following (*a*);

2. If given at his residence, it must be given before the usual hours of rest on the day following (*b*);

3. If sent by mail, it must be deposited in the post-office

* Error in engrossing.

in time to reach him in usual course on the day following (*c*).

(*a*) Adams *v.* Wright, 14 Wis. 408; Cayuga County Bank *v.* Hunt, 2 Hill, 635; Marks *v.* Boone, 24 Fla. 177; Bell *v.* Hagerstown Bank, 7 Gill, 216; Daniel on Neg. Inst., section 1038. The notice must follow upon the first demand. Rosson *v.* Carroll, 90 Tenn. 90.

(*b*) Phelps *v.* Stocking, 21 Neb. 444; Darbishire *v.* Parker, 6 East. 8. While service at the place of business must be during business hours, service at the residence is not so regulated. It will be sufficient if made during any of the hours when members of household are tending to their ordinary affairs. Adams *v.* Wright, 14 Wis. 408, 416. If the service is properly made at the place of business or residence, it is immaterial that the party to be notified did not in fact receive the notice. Adams *v.* Wright, 14 Wis. 408.

(*c*) See note to next section.

§ 104. **Where parties reside in different places.**— Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter (*a*).

2. If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision (*b*).

(*a*) Sanderson *v.* Sanderson, 20 Fla. 292; Rosson *v.* Carroll, 90 Tenn. 90; Stephenson *v.* Dickson, 24 Pa. St. 148; Whitwell *v.* Johnson, 17 Mass. 449. In Smith *v.* Poillon, 87 N. Y. 590, 597, Earl, J., said: "From a careful examination of all these authorities and many others, it is clear that the law is not precisely settled. It appears that at first it was supposed to be necessary that notice of dishonor should be given by the next post after dishonor, on the same day, if there was one. That rule was found inconveniently stringent, and then it was held that when the parties lived in different places, between which there was a mail, the notice could

be posted the next day after the dishonor or notice of dishonor. Some of the authorities hold that the party required to give the notice may have the whole of the next day. Some of them hold that when there are several mails on the next day, it is sufficient to send the notice by any post of that day. Other authorities lay down the rule, in general terms, that the notice must be posted by the first practical and convenient mail of the next day; and that rule seems to be supported by the most authority in this State. What is a practical and convenient mail depends upon circumstances. It may be controlled by the usages of business and the customs of the people at the place of mailing, and the condition, situation and business engagements of the person required to give the notice. The rule should have a reasonable application in every case, and whether sufficient diligence has been used to mail the notice, the facts being undisputed, is a question of law." But see Burgess *v.* Vreeland, 4 Zab. (N. J.), 71; Winans *v.* Davis, 3 Harr. (N. J.), 276. Where it is proper to send the notice by the mail, and it has not arrived at as early a date as in the regular course of the mail it might have come if started at the proper time, the onus is upon the plaintiff to prove that it was put in the mail at the proper time. Friend *v.* Wilkinson, 9 Gratt. 31.

(*b*) Bank of Columbia *v.* Lawrence, 1 Peters, 578; Jarvis *v.* St. Croix Mfg. Co., 23 Me. 287.

§ 105. **When sender deemed to have given due notice.**—Where notice of dishonor is duly addressed and deposited in the post-office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails (*a*).

(*a*) Windham Bank *v.* Norton, 22 Conn. 213; Pier *v.* Heinrichsoffen, 67 Mo. 163; Bell *v.* Hagerstown Bank, 7 Gill, 216; Sasscer *v.* Farmers' Bank, 4 Md. 409; Cook *v.* Foraker, 193 Pa. St. 461. In Shed *v.* Brett, 1 Pick. 401, 410, it was said: "The mail being established by standing laws of the Government for the purpose principally of facilitating the transmission of mercantile correspondence, it being by far the most usual conveyance of letters and generally the most sure as to time, and safe in every other respect, all men who deal in mercantile paper are presumed to assent, and even expect, that such information as they may want will be communicated in this way. And thus the post-office be-

comes their agent; and if it happened to fail from any unexpected cause, he who made the right use of it by placing his letter there properly directed has done all his duty, and the consequences must fall upon him who has to receive."

§ 106. **Deposit in post-office; what constitutes.**—Notice is deemed to have been deposited in the post-office when deposited in any branch post-office or in any letter-box under the control of the post-office department (*a*).

(*a*) See Nat. Bank *v.* Shaw, 79 Me. 376; Pearce *v.* Langfit, 101 Pa. St. 507; Johnson *v.* Brown, 154 Mass. 105; Skilbeck *v.* Garbett, 7 Q. B. 846. In some cases it has been held that delivery to a letter carrier was sufficient. Pearce *v.* Langfit, 101 Pa. St. 507; Shoemaker *v.* Mechanics' Bank, 59 Pa. St. 79. But it was not deemed wise to adopt this rule in the statute.

§ 107. **Notice to subsequent party; time of.**—Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor (*a*).

(*a*) Howland *v.* Adrian, 29 N. J. Law, 41; Howard *v.* Ives, 1 Hill, 263; Jameson *v.* Swinton, 2 Taunt. 224; Shelburne Falls National Bank *v.* Townley, 102 Mass 177; Seaton *v.* Scovill, 18 Kans. 435; Haly *v.* Brown, 5 Pa. St. 178; Etting *v.* Struthers *v.* Blake, 30 Pa. St. 139; Schuylkill Bank, 2 Pa. St. 355; Bray *v.* Hadwen, 5 Maule & Sel. 68; Linn *v.* Horton, 17 Wis. 150. If the holder of an indorsed bill or note chooses to rely upon the responsibility of his immediate indorser, there is no necessity for his giving notice to any previous party; and if such notice be properly given in time, by the other parties, it will enure to the benefit of the holder and he may recover thereon against any of them. Thus, if the holder notifies the sixth indorser, and he the fifth, and so on to the first, the latter will be liable to all the parties. And it is no objection to such notice that it is not in fact received so soon by the first or any prior indorser, as if it had been transmitted directly by the holder or notary, provided it has been seasonably sent by each indorser as he received it. Colt *v.* Noble, 5 Mass. 167; Mead *v.* Engs, 5 Cow., 303; Howard *v.* Ives, 1 Hill, 263. And the same degree of diligence must be exercised on the part of

the indorser in forwarding notice as is required of the holder. Ordinary diligence must be used in both cases. He is not bound to forward notice on the very day upon which he receives it, but may wait until the next. See cases above cited.

§ 108. **Where notice must be sent.**—Where a party has added an address to his signature, notice of dishonor must be sent to that address (*a*); but if he has not given such address, then the notice must be sent as follows:

1. Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters (*b*); or

2. If he live in one place, and have his place of business in another, notice may be sent to either place (*c*); or

3. If he is sojourning in another place, notice may be sent to the place where he is sojourning (*d*).

But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section (*e*).

(*a*) Bartlett *v.* Robinson, 39 N. Y. 187. In this case the indorsement was in the following form: "Chas. Robinson, 214 E. 18th Street." The notice of dishonor sent through the post-office was addressed "Chas. Robinson, Esq., City of New York," and was not received by the indorser. Held, that he was discharged.

(*b*) Bank of Columbia *v.* Lawrence, 1 Peters, 578; National Bank *v.* Cade, 73 Mich. 449; Northwestern Coal Co. *v.* Bowman, 69 Iowa 103; Mercer *v.* Lancaster, 5 Pa. St. 160; Woods *v.* Neeld, 44 Pa. St. 86; Haly *v.* Brown, 5 Pa. St. 178; Rand *v.* Reynolds, 2 Gratt. 171. But if sufficient inquiries have been made, and information received on which the holder has a right to rely, a mistake as to the nearest or usual post-office does not release the indorser. Moore *v.* Hardcastle, 11 Md. 486. For a case where the indorser received his mail at two post-offices, see Shelburne Falls Nat. Bank *v.* Townsley, 107 Mass. 444.

(*c*) Bank of U. S. *v.* Carneal, 2 Peters, 549; Williams *v.* Bank of U. S., 2 Peters, 96; Montgomery Co. Bank *v.* Marsh, 7 N. Y. 481. The rule that notice might be served at the place of business,

as well as at the residence, was not changed by the former statute of Wisconsin, Laws 1861, Ch. 79. Simms *v.* Larkin, 19 Wis. 390.

(*d*) Chouteau *v.* Webster, 6 Mete. 1; Young *v.* Durgin, 15 Gray, 261; Bigley's Adm'r. *v.* Cluff, 16 Gratt. 284, 291-292.

(*e*) Although the residence or place of business is the usual and proper place for giving notice, it will be good if actually given anywhere. Dickens *v.* Hall, 87 Pa. St. 379, 380. If the party to be charged receives the notice in due time he cannot object to the means employed. Terrell *v.* Jones, 15 Wis. 253; Whitford *v.* Burckmeyer, 1 Gill, 127. But if the holder employs other means than the mail he does so at his own risk. (*Id.*) Notice sent by telegraph, for example, would undoubtedly be sufficient if actually received, and an omission to post the notice in due season might be corrected in this way. See Sec. 104.

§ 109. **Waiver of notice.**—Notice of dishonor may be waived, either before the time of giving notice has arrived or after the omission to give due notice (*a*), and the waiver may be express or implied (*b*).

(*a*) Robinson *v.* Barnett, 19 Fla. 670. If an indorser, with full knowledge of the laches of the holder in neglecting to protest a bill or note, unequivocally assents to continue his liability, or to be responsible, as though due protest had been made, he is held to have waived the right to object, and will stand in the same position as if he had been regularly charged by presentment, demand, and notice. This assent must be clearly established, and will not be inferred from doubtful or equivocal acts or language. It has been frequently held that a promise by the indorser to pay the note or bill, after he has been discharged by the failure to protest it, will bind the indorser, provided he had full knowledge of the laches when the promise was made. A promise made under those circumstances affords the clearest evidence that the indorser does not intend to take advantage of the laches of the holder; and the law, without any new consideration moving between the parties, gives effect to the promise. The assent of the indorser to be bound, notwithstanding he has not been duly charged, may be established by any transaction between him and the holder, which clearly indicates this purpose and intention. Ross *v.* Hurd, 71 N. Y. 14, 18; Turnbull *v.* Maddux, 68 Md. 579; Lewis *v.* Brehme, 33 Md. 412; Bank *v.* Dibbrell, 91 Tenn. 301; Low *v.* Howard, 10

Cush. 159; Smith *v.* Lownsdale, 6 Oregon 78; Whittaker *v.* Morrison, 1 Fla. 25. But it must appear in such case that the indorser had knowledge of the fact that the holder was in default. Thornton *v.* Wynn, 12 Wheat. 183; Hunter *v.* Hook, 64 Bark. 469; Gawtry *v.* Doane, 48 Barb. 148; Schierl *v.* Baumel, 75 Wis. 75; Glaser *v.* Rounds, 16 R. I. 235. And in Massachusetts it is held that knowledge on the part of an indorser that demand upon the maker has not been made is material, and must be proved, notwithstanding the fact that he knew that the note had not been paid and that notice of non-payment had not been given, and was aware that he was discharged from all liability. Parks *v.* Smith, 155 Mass. 26, 33; Garland *v.* Salem Bank, 9 Mass. 408; Low *v.* Howard, 10 Cush. 159; S. C. 11 Cush. 268; Kelley *v.* Brown, 5 Gray, 108.

(*b*) Jenkins *v.* White, 147 Pa. St. 303. A waiver will not be presumed without the most satisfactory proof. Lockwood *v.* Crawford, 18 Conn. 374. But it is not essential that the waiver be in writing. When the fact is established by competent evidence, a parol waiver is as valid and binding as a written one. The only difference is in the character of the proof. Annville National Bank *v.* Kettering, 106 Pa. St. 531, 534. A part payment of a note by the indorser, not explained or qualified by any accompanying circumstances, will be held to be sufficient evidence of waiver of notice. Whittaker *v.* Morrison, 1 Fla. 25. As to whether an indorser who has taken sufficient security to protect himself against possible loss waives his legal right to require proof of demand and notice, the authorities are not agreed. Smith *v.* Lownsdale, 6 Ore. 78; Haskell *v.* Boardman, 8 Allen, 38; Moore *v.* Alexander, 63 App. Div. 100; Mechanics' Bank *v.* Griswold, 7 Wend. 165; Brown *v.* Maffey, 15 East, 222. As to when question of waiver is for the jury, see Valley Nat. Bank *v.* Uhler, 191 Pa. St. 356; Jones *v.* Roberts, 191 Pa. St. 152.

§ 110. **Whom affected by waiver.**—Where the waiver is embodied in the instrument itself, it is binding upon all parties (*a*); but where it is written above the signature of an indorser, it binds him only (*b*).

(*a*) Phillips *v.* Dippo, 93 Iowa 35; Smith *v.* Pickham, 8 Tex. Civ. App. 326; Bryant *v.* Merchants' Bank, 8 Bush, 43; Lowry *v.*

Steele, 27 Ind. 168; Farmers' Bank of Kentucky *v.* Ewing, 78 Ky. 264; Bryant *v.* Taylor, 19 Minn. 396.

(*b*) Woodman *v.* Thurston, 8 Cush. 157; Farmers' Bank *v.* Ewing, 78 Ky. 264.

§ 111. **Waiver of protest.**—A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor (*a*).

(*a*) First Nat. Bank *v.* Falkenham, 94 Cal. 141. While in a strict and technical sense the term protest when used in reference to commercial paper means only the formal declaration drawn up and signed by a notary; yet in a popular sense, and as used among men of business, it includes all the steps necessary to charge an indorser; and in waiving protest an indorser is supposed to use in it this sense. Coddington *v.* Davis, 1 N. Y. 186, 189-190; Annville Nat. Bank *v.* Kettering, 106 Pa. St. 531; First Nat. Bank *v.* Schreiner, 110 Pa. St. 188; Continent Life Ins. Co. *v.* Barber, 50 Conn. 567; Brewster *v.* Arnold, 1 Wis. 264; Wilkie *v.* Chandon, 1 Wash. 355. But the waiver will not be extended beyond the fair import of the terms; and hence, a waiver of "notice of protest" will not be deemed a waiver of demand. Sprague *v.* Fletcher, 8 Oregon 367. In construing a pleading a more technical rule will be applied, and an allegation that the instrument was duly protested will not be held to comprehend an averment that notice of dishonor was given to the indorser. Cook *v.* Warren, 88 N. Y. 37.

§ 112. **When notice is dispensed with.**—Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties to be charged (*a*).

(*a*) Hobbs *v.* Straine, 149 Mass. 212; Staylor *v.* Ball, 24 Md. 183. Reasonable diligence is all that is required. The law does not exact every possible exertion which might have been made to effect notice of the dishonor of the paper. Bank of Port Jefferson *v.* Darling, 91 Hun, 236. But, as said by Lord Ellenborough, the holder cannot allow himself to remain "in a state of passive and

contented ignorance." Bateman *v.* Joseph, 2 Campb. 461. What is reasonable diligence will depend upon the circumstances of each case. What would be sufficient in one case might fall short in another. Howland *v.* Adrian, 29 N. J. Law, 41. And any mode of inquiry will be sufficient which under the circumstances of the case evinces reasonable diligence. Hartford Bank *v.* Stedman, 3 Conn. 494. But bare reliance upon a directory is not sufficient. Bacon *v.* Hanna, 137 N. Y. 379, 382. In the case last cited, the court said: "Merely looking into a directory is not enough. The sources of error in that process are too many and too great. Such books are accurate enough in a general way, and convenient as an aid or assistance, but they are private ventures, created by irresponsible parties, and depending upon information gathered as cheaply as possible and by unknown agents. Their help may be invoked, but, as was said in Lawrence *v.* Miller, 16 N. Y. 231, their error may excuse the notary, but will not charge the defendant. Merely consulting them should not be deemed 'the best information obtained by diligent inquiry.' Greenwich Bank *v.* DeGroot, 7 Hun, 210; Baer *v.* Leppert, 12 Hun, 516." If the holder is ignorant of the address he should apply to the other parties to the instrument for information. University Press *v.* Williams, 48 App. Div. (N. Y.) 190. When a notary is employed, it is the duty of the holder to inform him of the indorser's place of residence; and if this be omitted, the notary ought to apply to all the parties to the instrument for information, and especially to the holder himself. Hill *v.* Farrell, 3 Greenleaf, 233; Haly *v.* Brown, 5 Pa. St. 178, 182; Tate *v.* Sullivan, 30 Md. 464; Staylor *v.* Ball & Williams, 24 Md. 183. But as the duty to give notice, and therefore the duty of due diligence to discover the residence of the indorser, arises subsequently to the dishonor of the note, it is not an element of due diligence that the owner should previously have communicated his knowledge of the indorser's residence to the holder for collection. Bartlett *v.* Isbell, 31 Conn. 297. Where it does not appear that the residence of the indorser has been changed previously to the time of sending the notice, it will be presumed that there has been no change of residence up to that time. Mohlman Co. *v.* McKane, 60 App. Div. 546 (a case arising under the statute). Where the facts are undisputed the question of due diligence in seeking to give notice of dishonor is for the court. Haly *v.* Brown, 5 Pa. St. 178.

§ 113. **Delay in giving notice; how excused.**—Delay in

giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence (*a*).

(*a*) In Martin *v.* Ingersoll (8 Pick. 1) the delay was caused by the fact that during the Christmas holidays vessels were not allowed to clear from Havana: Held, that during the continuance of the holidays it was not necessary to write a notice of the dishonor of a bill.

§ 114.—**When notice need not be given to drawer.**—Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person (*a*);

2. When the drawee is a fictitious person or a person not having capacity to contract;

3. When the drawer is the person to whom the instrument is presented for payment;

4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument (*b*);

5. Where the drawer has countermanded payment.

(*a*) Roach *v.* Ostler, 1 Man. & Ry. 120; Planters' Bank *v.* Evans, 36 Tex. 592; Chicago, etc., R. R. Co. *v.* West, 37 Ind. 211. When the drawer and the drawee are the same in contemplation of law, the rule applicable to such draft is, that in legal operation it is regarded as a promissory note, payable on demand, and the maker thereof is not entitled to notice. Bailey *v.* Southwestern R. R. Bank, 11 Fla. 266. Notice is not required to render a firm liable where all the members of the firm are members of the house which drew the bill. West Branch Bank *v.* Fulner, 3 Pa St. 399.

(*b*) Life Insurance Company *v.* Pendleton, 112 U. S. 708; Wollenweber *v.* Ketterlinn, 17 Pa. St. 389. Although the drawer has no funds in the hands of the drawee, yet if he has a right to expect to have funds in the hands of the drawee to meet the bill, or if he has a right to expect the bill to be accepted by the drawee in consequence of an agreement or an arrangement with him, or

if upon taking up the bill he would be entitled to sue the drawee or any other party to the bill, then in every such case he is entitled to strict notice of dishonor. Pitts *v.* Jones, 9 Fla. 519.

§ 115. **When notice need not be given to indorser.**—Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument (*a*);

2. Where the indorser is the person to whom the instrument is presented for payment (*b*);

3. Where the instrument was made or accepted for his accommodation (*c*).

(*a*) See note to section 9.

(*b*) In re Swift, 106 Fed. Rep. 65 (a case arising under the statute).

(*c*) French *v.* Bank of Columbia, 4 Cranch, 141; Ross *v.* Bedell, 5 Duer, 462; Blenderman *v.* Price, 50 N. J. L. 296; Torrey *v.* Frost, 40 Me. 74. Where one, as indorser, procures the note of another to be discounted by a bank for his credit, and at the time the discount is effected makes a distinct promise to the bank to pay the note at maturity, his liability is absolute, not conditional, and protest and notice of non-payment are unnecessary. Sieger *v.* Second National Bank, 132 Pa. St. 307.

§ 116. **Notice of non-payment where acceptance refused.**—Where the* notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the mean time the instrument has been accepted (*a*).

(*a*) De la Torre *v.* Barclay, 1 Stark. 308; Campbell *v.* French, 6 T. R. 200.

§ 117. **Effect of omission to give notice of non-acceptance.**—An omission to give notice of dishonor by

* Error in engrossing. Should be "due."

non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission (*a*).

(*a*) The Wisconsin Act contains the following additional provision: "But this shall not be construed to revive any liability discharged by such omission."

§ 118. **When protest need not be made; when must be made.**—Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required, except in the case of foreign bills of exchange (*a*).

(*a*) Bay *v.* Church, 15 Conn. 129; Legg *v.* Vinal, 165 Mass. 555; Tate *v.* Sullivan, 30 Md. 464; Weems *v.* Farmers' Bank, 15 Md. 231; Ricketts *v.* Pendleton, 14 Md. 320; Sumner *v.* Kimball, 2 Wis. 524; Stephenson *v.* Dickson, 24 Pa. St. 148. While protest is not necessary, except in case of foreign bills, it is very convenient in all cases, because it affords the easiest and most certain method of proving the fact of dishonor and the notice to the indorsers. Under the statutes of nearly all, if not all of the States, the certificate of the notary making the protest is *prima facie* evidence of these facts. As to what are foreign bills, see section 129. For other provisions relative to protest, see sections 152-160.

ARTICLE VIII.*

Discharge of Negotiable Instruments.

Section 119. Instrument; how discharged.
120. When person secondarily liable on, discharged.
121. Right of party who discharges instrument.

* The numbers of the sections of this article in other States than Pennsylvania are as follows: Colorado, Connecticut, District of Columbia, Florida, Massachusetts, North Carolina, North Dakota, Oregon, Tennessee, Utah, Virginia and Washington, 110-125; New York, 200-206; Maryland, 127-133; Rhode Island, 127-133; Wisconsin, 1679-1679-6.

Section 122. Renunciation by holder.
123. Cancellation; unintentional; burden of proof.
124. Alteration of instrument; effect of.
125. What constitutes a material alteration.

§ 119. **Instrument; how discharged.***—A negotiable instrument is discharged:

1. By payment (*a*) in due course by or on behalf of the principal debtor (*b*);

2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;

3. By the intentional cancellation thereof by the holder (*c*);

4. By any other act which will discharge a simple contract for the payment of money (*d*);

5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right (*e*).

(*a*) The possession of a bill of exchange by the acceptor after it has been in circulation is *prima facie* evidence that it has been paid by him. Baring *v.* Clark, 19 Pick. 220. So the possession of a promissory note by the maker. First Nat. Bank *v.* Harris, 7 Wash. 139; Perez *v.* Bank of Key West, 36 Fla. 467. But see Miller *v.* Kreiter, 76 Pa. St. 78; Eckert *v.* Cameron, 7 Wright, 120. When the holder of a bill of exchange, accepted for the accommodation of the drawer, sends it to a bank for collection, and the bank, when the bill comes to maturity, pays the amount thereof to the credit of the holder, this is not such a payment as discharges the acceptor; but the bank succeeds to the rights of the holder, and may maintain an action on the bill against the acceptor. Pacific Bank *v.* Mitchell, 9 Met. 297.

(*b*) A payment made to the holder of a promissory note by an indorser, not as agent for the maker, but simply in discharge of his obligation as indorser, where the note was executed by the

* Through an error in engrossing the words in the headnote have been transposed. It was intended to read, "How instrument discharged." The error was not corrected by Laws N. Y. 1898, ch. 336.

maker for value, does not enure to the benefit of the latter, and in an action upon the note he is liable for the whole amount thereof, notwithstanding the payment. Madison Square Bank *v.* Pierce, 137 N. Y. 444. In the case cited it was said: "To the extent of the money paid, the indorser becomes equitably entitled to be substituted to the rights and remedies of the holder, and becomes, *pro tanto,* the beneficial owner of the debt; so that the maker's obligation to pay the note in full, at first due to the holder solely in his own right, becomes, after the part payment by the indorser, still wholly due to the holder, but partly in his own right and partly as trustee for the indorser. A court of law cannot split the note into parts, and must act upon the legal interest and ownership." For cases where payment made by person secondarily liable, see section 121.

(*c*) See section 123.

(*d*) Thus, the release of one joint maker will operate to discharge the other joint parties. Crawford *v.* Roberts, 8 Oregon 324. But to have this effect the release must be under seal. Shaw *v.* Pratt, 22 Pick. 305.

(*e*) He must become the holder in the same right in which he executed the instrument. If he should become the holder in a representation capacity, for example, as executor, the instrument would not be discharged. Nash *v.* DeFreville (1900), 2 Q. B. 72. See section 50.

§ 120. **When persons secondarily liable on, discharged.**—A person secondarily liable on the instrument is discharged:

1. By any act which discharges the instrument;

2. By the intentional cancellation of his signature by the holder;

3. By the discharge of a prior party (*a*);

4. By a valid tender of payment made by a prior party (*b*);

5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved (*c*);

6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to

enforce the instrument (*d*), unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved (*e*).

(*a*) Shutts *v.* Fingar, 100 N. Y. 539; Couch *v.* Waring, 9 Conn. 261; Gennis *v.* Weighley, 114 Pa. St. 194. It is a general rule that whatever discharges the maker or acceptor discharges the drawer and indorser, who are sureties, for the contract which they undertook to assume thus passes out of existence by the act of the beneficiary. And whatever discharges a prior indorser discharges all subsequent indorsers, for the reason that he stood between them and the holder, and on making payment each one could have had recourse against him, but from which his discharge precludes them. The contracts of the parties are said to be like the links of a pendant chain; if the holder dissolves the first, every link falls with it. Shutts *v.* Fingar, *supra*. But this rule, of course, does not apply where a prior party has been discharged by the laches of the intermediate indorser; for the holder need give notice only to his immediate indorser. West River Bank *v.* Taylor, 34 N. Y. 128, 131. And after the responsibility of an indorser has been fixed no act or dealing of the holder with the maker will discharge the indorser, except it be such an act as will defeat, impair or delay the right of the indorser, on paying the note, to recover against the maker. Farmers' Bank *v.* Sprigg, 11 Md. 390. Where the holder of a note, with several indorsers in blank, sues the maker and writes over the name of the first indorser an order to pay to himself, the holder, but without striking out the names of the subsequent indorsers, he does not thereby discharge them, and therefore one of them who pays the amount of the note to the holder may sue any of the prior parties. Cole *v.* Cushing, 8 Pick. 48. An indorser is discharged where the holder has allowed the statute of limitations to run against the maker. Shutts *v.* Fingar, 100 N. Y. 539.

(*b*) Spurgeon *v.* Smiths, 114 Ind. 453. In the Wisconsin Act the following is added: "4*a*. By giving up or applying to other purposes collateral security applicable to the debt, or, there being in the holder's hands or within his control the means of complete or partial satisfaction, the same are applied to other purposes."

(*c*) By an express reservation of the holder's rights against the drawer or indorsers, their rights against the maker or acceptor are reserved by implication. Gloucester Bank *v.* Worcester, 10

Pick. 528; Tombeckbe Bank *v.* Stratton, 7 Wend. 429; Stewart *v.* Eden, 2 Cai. 121. The giving of a judgment or other security by the maker or a prior indorser does not discharge a subsequent indorser. First Nat. Bank *v.* Peltz, 176 Pa. St. 513; Guarantee Co. *v.* Craig, 155 Pa. St. 343.

(*d*) Any extension, no matter how short, by a valid agreement, will discharge the indorser or surety. Cary *v.* White, 52 N. Y. 138; Nightingale *v.* Meginnis, 34 N. J. Law, 461; Siebeneck *v.* Anchor Savings Bank, 111 Pa. St. 187; *In re* Bishop's Estate, 195 Pa. St. 85; Fridenberg *v.* Robinson, 14 Fla. 130. But there must be an enforcible agreement to this effect, either expressed or implied. (*Id.*) Ordinarily the taking of a new note from the debtor, payable at a future day, suspends the right of action upon the original demand until the maturity of the new note, and hence discharges a non-assenting surety. Hubbard *v.* Gurney, 64 N. Y. 450; Place *v.* McIlvain, 38 N. Y. 960; Fridenberg *v.* Robinson, 14 Fla. 130. But when the new security is payable on demand no presumption arises of an agreement. Board of Education *v.* Fonda, 77 N. Y. 350, 362. And where new security is taken merely as collateral, the fact that the collateral may not be enforcible until a definite time in the future does not operate to extend the time of payment of the principal debt or suspend the right to sue on the original security. Falkill National Bank *v.* Sleight, 1 App. Div. 189, 191; United States *v.* Hodge, 6 How. (U. S.) 279. Mere indulgence to the maker or acceptor will not discharge a drawer or indorser; there must be an agreement to extend the time of payment binding upon the holder. Smith *v.* Erwin, 77 N. Y. 466; Bank of Utica *v.* Ives, 17 Wend. 501; Crawford *v.* Millspaugh, 13 Johns. 87; Lockwood *v.* Crawford, 18 Conn. 376; Fridenberg *v.* Robinson, 14 Fla. 130. And for this purpose the contract must be supported by a valid consideration. Cary *v.* White, 52 N. Y. 138. A part payment by the maker is not such a consideration, Halliday *v.* Hart, 30 N. Y. 474; nor is an agreement to pay interest, since it is merely a promise to do what the party is already bound to do. Wilson *v.* Powers, 130 Mass. 127; Stuber *v.* Schack, 83 Ill. 192. An indorser is not discharged by extending the maker's time to answer. German-Am. Bank *v.* Niagara Cycle Co., 13 App. Div. 450. The ground upon which an agreement to give time to the maker, made by the holder without the consent of the indorsers, upon a valid consideration, is held to be a discharge of the indorsers, is solely this, that the holder thereby

impliedly stipulates not to pursue the indorsers, or to seek satisfaction from them in the intermediate period. It can never apply to any case where a contrary stipulation exists between the parties. Hence, if the agreement for delay expressly saves and reserves the rights of the holder in the intermediate time against the indorsers, it will not discharge the latter. In such case the very ground of the objection is removed, for their rights are not postponed against the maker if they should take up the note. Hagey *v.* Hill, 75 Pa. St. 108, 111. The burden of showing that the indorser assented to such extension of time is on the party seeking to charge him. Siebeneck *v.* Anchor Savings Bank, 111 Pa. St. 187. It has been held that time given to an indorser will not discharge an accommodation maker. Delaware County Trust Co. *v.* Title Ins. Co., 199 Pa. St. 17. The statute has not changed this rule. See Sec. 192.

(*e*) Wagman *v.* Hoag, 14 Barb. 233, 239; Rockville National Bank *v.* Holt, 58 Conn. 526; Bank *v.* Simpson, 90 N. C. 469; Minir *v.* Crawford, L. R. 2 Scotch Appeals, 456; Kenworthy *v.* Sawyer, 125 Mass. 28; Morse *v.* Huntington, 40 Vt. 488; Hagey *v.* Hill, 75 Pa. St. 108. In the Wisconsin Act, for subdivision 6 the following is substituted: "By an agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument unless made with the assent, prior or subsequent, of the party secondarily liable, unless the right of recourse against such party is expressly reserved, or unless he is fully indemnified."

§ 121. **Right of party who discharges instrument.**—Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument (*a*), except:

1. Where it is payable to the order of a third person, and has been paid by the drawer; and

2. Where it was made or accepted for accommodation, and has been paid by the party accommodated (*b*).

(*a*) Where an indorser takes up the instrument, after it has been

dishonored, by paying the amount of it to the holder, the transaction is in effect a repurchase of the paper, and not a payment of it, and the indorser becomes vested again with all the rights which he formerly had against prior parties. French *v.* Jarvis, 29 Conn. 347. And the paper retains its negotiable character. Gould *v.* Eager, 17 Mass. 615; Davis *v.* Miller, 14 Gratt. 1. And although in the case of accommodation paper the indorsee may not pay actual value at the time of his indorsement, yet if he pays the instrument and gets possession of it he is deemed a holder. Reinhart *v.* Schall, 69 Md. 352. It is necessary to strike out all subsequent indorsements; for after the paper has once been paid it cannot be negotiated again if such negotiation would make any of the parties liable who would otherwise be discharged. Goodner *v.* Maynard, 7 Allen, 456; Citizens' Bank *v.* Say, 80 Va. 436. And by putting the note in circulation again the liability of subsequent parties is not revived. Davis *v.* Miller, 14 Gratt. 1. A note coming into the hands of the maker under such circumstances as to raise a presumption of its payment cannot be pledged by him as collateral so as to bind a surety, although the note may not have matured at the time of its re-issue. First National Bank *v.* Harris, 7 Wash. 139. Where payment is made by the second indorser, the case is within the provisions of the section. Twelfth Ward Bank *v.* Brooks, 63 App. Div. 220. See Sec. 119.

(*b*) Cottrell *v.* Watkins, 89 Va. 801. Where the instrument is paid by an accommodation acceptor it is discharged, and becomes commercially dead, but is evidence in the hands of the payer to charge the real debtor. First Nat. Bank *v.* Maxfield, 83 Me. 576. So, where one of several accommodation makers pays the note, it remains in his hands evidence of his right to contribution from his co-sureties. This right may be assigned by him, and the delivery of the note by him to a third person for a valuable consideration raises a presumption of an intention to pass this right to the transferee. Dillenbeck *v.* Bygert, 97 N. Y. 303. Where an accommodation indorser for the payee has paid the note he may recover the amount of an accommodation maker. Laubach *v.* Pursell, 35 N. J. Law, 434. And where a second indorser of a note has paid and taken it up he becomes a holder for value, and may maintain an action to recover the amount thereof of the first indorser, although both are accommodation indorsers. Kelly *v.* Burroughs, 102 N. Y. 93. See also Kaschner *v.* Conklin, 40 Conn. 81. See Sec. 68.

§ 122. **Renunciation by holder.**—The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument, discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

§ 123. **Cancellation; unintentional; burden of proof.**—A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been canceled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority.

§ 124. **Alteration of instrument; effect of.**—Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers (*a*). But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor (*b*).

(*a*) See Jeffreys *v.* Rosenfeld, (Mass.) 61 N. E. Rep. 49, where the effect of this provision was discussed, but not decided. The burden of explaining an apparent alteration is upon the party producing the paper. Gowdey *v.* Robbins, 3 App. Div. 353; Town of Solon *v.* Williamsburgh Savings Bank, 114 N. Y. 122, 135; Simpson *v.* Davis, 119 Mass. 269; Gettysburg National Bank *v.* Chisolm, 169 Pa. St. 564; Citizen's Nat. Bank *v.* Williams, 174 Pa. St. 66; Paine *v.* Edsell, 19 Pa. St. 178. If the paper appears to have been altered he must explain this appearance; but if, on the other hand, however material in fact the alteration may be, there is upon the face of the paper no evidence or mark raising

a suspicion thereof, the holder is not called upon to make an explanation or to introduce any testimony until the alteration has been shown by sufficient evidence outside of the paper. Harris *v.* The Bank of Jacksonville, 20 Fla. 501, 512.

(*b*) Willis *v.* Wilson, 3 Oregon 308. This changes the law in some States. Prior to the statute the rule in many jurisdictions was that where the alteration was made without the consent of the party sought to be charged, there could be no recovery even by an innocent holder for value, and even though he sought to recover on the instrument as it was before the alteration. Gettysburg National Bank *v.* Chisolm, 169 Pa. St. 564; Hartley *v.* Carboy, 150 Pa. St. 23; Wood *v.* Steele, 6 Wall. 80; Citizens' National Bank *v.* Richmond, 121 Mass. 110. In the case first cited it was said: "In the present case the alteration was not probably made by an agent of the payee, and it was entirely without the knowledge and consent of the defendant, who was the maker of the note. Of course the payee could not recover on the note for any amount, because it was an altered instrument, and is avoided altogether by public policy. Certainly he could not restore life to it by passing it over to an indorsee." But compare Gleason *v.* Hamilton, 138 N. Y. 353; Town of Solon *v.* Williamsburgh Savings Bank, 114 N. Y. 122, 134. In cases of mere spoliation, where the original tenor was apparent upon inspection, it has been held sufficient to declare on the instrument in such form, and upon the spoliation being shown, there is no variance between the allegation and the proof. Drum *v.* Drum, 133 Mass. 566. A similar rule would now seem to apply where there was proof that the plaintiff was not a party to the alteration.

§ 125. **What constitutes a material alteration.**—Any alteration which changes:

1. The date (*a*);

2. The sum payable, either for principal (*b*) or interest (*c*);

3. The time (*d*) or place (*e*) of payment;

4. The number or the relations of the parties (*f*);

5. The medium or currency in which payment is to be made (*g*);

Or which adds a place of payment where no place of payment is specified (*h*), or any other change or addition

which alters the effect of the instrument in any respect, is a material alteration (*i*).

(*a*) National Ulster County Bank *v.* Madden, 114 N. Y. 280; Crawford *v.* West Side Bank, 100 N. Y. 50, 56; Wood *v.* Steele, 6 Wall. 80; Newman *v.* King (Ohio), 43 N. E. Rep. 683.

(*b*) Batchelder *v.* White, 80 Va. 103. This is so, though the amount is lessened, as where $500 was changed to $400. Hewins *v.* Cargill, 67 Me. 554.

(*c*) Gettysburg National Bank *v.* Chisolm, 169 Pa. St. 564. In this case the words "with interest at six per cent." were interlined.

(*d*) Rogers *v.* Vosburgh, 87 N. Y. 208; Weyman *v.* Yeomans, 84 Ill. 403; Miller *v.* Gilleland, 19 Pa. St. 119.

(*e*) Tidmarsh *v.* Grover, 1 Maule & S., 735; Bank of Ohio Valley *v.* Lockwood, 13 W. Va. 392.

(*f*) Hoffman *v.* Planters' Nat. Bank, (Va.) 39 S. E. Rep. 134 (a case arising under the statute). In McCaughey *v.* Smith, 27 N. Y. 39, and Brownell *v.* Winnie, 29 N. Y. 400, it was held that the addition of another name as maker, where there was but one, was not a material alteration, the additional maker being regarded as a guarantor. The statute has probably changed this rule.

(*g*) Angle *v.* Insurance Company, 92 U. S. 330; Church *v.* Howard, 17 Hun, 5; Darwin *v.* Rippey, 63 N. C. 318; Bogarth *v.* Breedlove, 39 Tex. 561. Thus, adding to a note the words "in gold coin" is a material alteration. Wills *v.* Wilson, 3 Oregon 308.

(*h*) Whitesides *v.* Northern Bank, 10 Bush, 501.

(*i*) Weyerhauser *v.* Dun, 100 N. Y. 150. Addition of special agreement. In some States it has been held that the addition of the name of an attesting witness is a material alteration. Smith *v.* Dunham, 8 Pick. 246; Homer *v.* Wallis, 11 Mass. 310; Thornton *v.* Appleton, 29 Me. 298; Brackett *v.* Mountfort, 11 Me. 115. But in those States the attestation extends the liability of the maker under the statute of limitations, and so changes to some extent the nature of the contract and enlarges its obligations. In other States where such addition would not have this effect the alteration would not be material. Fuller *v.* Green, 64 Wis. 159.

CHAPTER II.

BILLS OF EXCHANGE.

ARTICLE I.*

Bills of Exchange; Form and Interpretation.

Section 126. Bill of exchange defined.
127. Bill not an assignment of funds in hands of drawee.
128. Bill addressed to more than one drawee.
129. Inland and foreign bills of exchange.
130. When bill may be treated as promissory note.
131. Drawee in case of need.

§ 126. Bill of exchange defined.—A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.

Jarvis *v.* Wilson, 46 Conn. 91.

§ 127. Bill not an assignment of funds in hands of drawee.—A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same (*a*).

(*a*) Harris *v.* Clark, 3 N. Y. 93; Mandeville *v.* Welch, 5 Wheat. 286; Brill *v.* Tuttle, 81 N. Y. 454; Alger *v.* Scott, 54 N. Y. 14; Munger *v.* Shannon, 61 N. Y. 251; Commonwealth *v.* Am. Life Ins. Co. 167 Pa. St. 586; Reilly *v.* Daly, 159 Pa. St. 605; Bailey *v.* South-

* The numbers of the sections of this article in other States than Pennsylvania are as follows: Colorado, Connecticut, District of Columbia, Florida, Massachusetts, North Carolina, North Dakota, Oregon, Tennessee, Utah, Virginia and Washington, 126-131; New York, 210-215; Maryland, 145-150; Rhode Island, 134-139; Wisconsin, 1680-1680-6.

western R. R. Bank, 11 Fla. 266. But when, for a valuable consideration from the payee, the order is drawn upon a third party and made payable out of a particular fund, then due or to become due, from him to the drawer, the delivery of the order to the payee operates as an assignment *pro tanto* of the fund, and the drawee is bound, after notice of such assignment, to apply the fund, as it accrues, to the payment of the order and to no other purpose, and the payee may, by action, compel such application. Brill *v.* Tuttle, 81 N. Y. 454, 457. An intention to make an assignment of the funds in the hands of the drawee may be inferred from the circumstances attending the delivery of the draft and the conduct of the parties. Throop Grain Cleaner Co. *v.* Smith, 110 N. Y. 83.

§ 128. **Bill addressed to more than one drawee.**—A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession (*a*).

(*a*) In the Wisconsin Act the words "or succession" are omitted.

§ 129. **Inland and foreign bills of exchange.**—An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this State. Any other bill is a foreign bill (*a*). Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

(*a*) Commercial Bank of Kentucky *v.* Varnum, 49 N. Y. 269; Life Insurance Company *v.* Pendleton, 112 U. S. 696; Armstrong *v.* American Ex. National Bank, 133 U. S. 433; Buckner *v.* Finley, 2 Peters, 586; Joseph *v.* Solomon, 19 Fla. 632; Phœnix Bank *v.* Hussey, 12 Pick. 483; Thompson *v.* Commercial Bank, 3 Caldw. 49; Union Bank *v.* Fowlkes, 2 Sneed, 556.

§ 130. **When bill may be treated as promissory note.**—Where in a bill the drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note (*a*).

(*a*) See section 17.

§ 131. **Referee in case of need.**—The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment (*a*). Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may see fit.

(*a*) The usual form is: "In case of need, apply to Messrs. C and D, at E." Chitty on Bills, 165.

ARTICLE II.*

Acceptance.

Section 132. Acceptance, how made, et cetera.
133. Holder entitled to acceptance on face of bill.
134. Acceptance by separate instrument.
135. Promise to accept, when equivalent to acceptance.
136. Time allowed drawee to accept.
137. Liability of drawee retaining or destroying bill.
138. Acceptance of incomplete bill.
139. Kinds of acceptances.
140. What constitutes a general acceptance.
141. Qualified acceptance.
142. Rights of parties as to qualified acceptance.

* The numbers of the sections in other States than Pennsylvania are as follows: Colorado, Connecticut, District of Columbia, Florida, Massachusetts, North Carolina, North Dakota, Oregon, Tennessee, Utah, Virginia and Washington, 132-142; New York, 220-230; Maryland, 151-161; Rhode Island, 140-150; Wisconsin, 1680*f*-1680*p*.

§ 132. **Acceptance; how made, et cetera.**—The acceptance of a bill is the signification by the drawee* to the order of the drawer (*a*). The acceptance must be in writing and signed by the drawee (*b*). It must not express that the drawee will perform his promise by any other means than the payment of money.

(*a*) The acceptance is a response to the direction contained in the bill, and the language of the bill and the acceptance are but parts of one entire contract in writing. Meyer *v.* Beardsley, 29 N. J. Law, 236. But this contract is regarded as a new contract. Superior City *v.* Ripley, 138 U. S. 93. The usual mode of making an acceptance is by writing the word "accepted," and subscribing the drawee's name. Byles on Bills, 190. But the drawee's signature alone is sufficient. Spear *v.* Pratt, 2 Hill, 582; Wheeler *v.* Webster, 1 E. D. Smith, 1.

(*b*) 1 Rev. Stat. N. Y. 768, section 6; Laws of Pa. 1881, 17. The English Bills of Exchange Act, following previous English statutes (1 and 2 George IV., C. 78; 19 and 20 Victoria, C. 78) requires that the acceptance be written on the bill. The American statutes do not generally require this; and such a requirement would sometimes work inconvenience. Thus, it has been held that a bank can accept a check by telegraph, and such an acceptance has been deemed to be within the terms of a statute requiring acceptances to be in writing, North Atchison Bank *v.* Garretson, 51 Fed. Rep. 167; but to require the acceptance to be on the instrument itself would preclude the giving of an acceptance by telegraph either by a bank or by any other drawee.

§ 133. **Holder entitled to acceptance on face of bill.**—The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused, may treat the bill as dishonored.

1 Rev. Stat. N. Y., section 9.

§ 134. **Acceptance by separate instrument.**—Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor, except in favor of a person to

* Through error in engrossing the words "of his assent" omitted in Pennsylvania statute.

whom it was shown and who, on the faith thereof, receives the bill for value.

1 Rev. Stat. N. Y., 768, section 7.

§ 135. **Promise to accept; when equivalent to acceptance.**—An unconditional promise in writing (*a*) to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value (*b*).

(*a*) An absolute authority to draw is equivalent to an unconditional promise to pay the draft within the statute. Ruiz *v.* Renauld, 100 N. Y. 256; Merchants' Bank *v.* Griswold, 72 N. Y. 472, 479; Barney *v.* Wortington, 37 N. Y. 112. The promise must be unconditional. Germania National Bank *v.* Tooke, 101 N. Y. 442; Shover *v.* Western Union Telegraph Co., 57 N. Y. 459, 463. But restrictions as to the time or amount do not prevent the promise from being treated as unconditional and absolute as to drafts within the limitation. Bank of Michigan *v.* Ely, 17 Wend. 508; Ulster Co. Bank *v.* McFarlan, 5 Hill, 432. It is also held that an authority given to an agent to draw "from time to time, as may be necessary in the purchase of lumber," or as "you want more funds," operates simply as an instruction to the agent, and does not, as to persons dealing with him in good faith, constitute a condition. Merchants' Bank *v.* Griswold, 72 N. Y. 472; Bank of Michigan *v.* Ely, 17 Wend. 508. The party dealing with the agent may rest upon his representation, express or implied, that the draft is in the business of the principal, or that the funds are needed, and he is protected, although it turns out that the representation is false. N. Y. & N. H. R. R. Co. *v.* Schuyler, 34 N. Y. 30; Merchants' Bank *v.* Griswold, 72 N. Y. 472. The requirement that the promise shall be in writing is wholly statutory. At common law an oral promise was sufficient. Dull *v.* Bricker, 76 Pa. St. 255; Scudder *v.* Union Nat. Bank, 91 U. S. 406; Williams *v.* Winans, 2 Gr. (N. J.) 239; Jarvis *v.* Wilson, 46 Conn. 91. A telegraphic authority is sufficient. Johnson *v.* Clark, 39 N. Y. 216; North Atchison Bank *v.* Garretson, 51 Fed. Rep. 167; Franklin Bank *v.* Lynch, 52 Md. 270. As to countermanding by telegraph an offer to accept, see First Nat. Bank *v.* Clark, 61 Md. 400. A promise to accept is governed by the law of the State

where it is made notwithstanding it is to be performed elsewhere. Scott *v.* Pilkington, 15 Abb. Pr. 280.

(*b*) 1 Rev. Stat. N. Y. 768, section 8; Brown *v.* Ambler, 66 Md. 391. But the holder must acquire the bill on the faith of the promise to accept. Howland *v.* Carson, 15 Pa. St. 453.

§ 136. **Time allowed drawee to accept.**—The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill (*a*); but the acceptance if given dates as of the day of presentation (*b*).

(*a*) See Byles on Bills, 182; Daniel on Neg. Inst., section 492. By the former statute of Massachusetts, the drawee had until two o'clock on the day following. (Public Statutes, 1882, Ch. 77, section 17.)

(*b*) There does not appear to be any direct authority on this point; the rule of the statute conforms to what is the common practice. See also statute of Massachusetts above referred to.

§ 137. **Liability of drawee retaining or destroying bill.**—Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same (*a*).

(*a*) 1 Rev. Stat. N. Y. 769, section 11. The refusal referred to in the statute is an affirmative act, or such conduct as amounts to an affirmative act; and mere retention of the bill, without a demand for a return, or a dissent to the retention, and with the permission of the owner is not an acceptance. Matteson *v.* Moulton, 79 N. Y. 627. In the Wisconsin Act the following words are added: "Mere retention of the bill is not acceptance." But in view of the language of the rest of the section they seem to be wholly unnecessary.

§ 138. **Acceptance of incomplete bill.**—A bill may be accepted before it has been signed by the drawer, or while

otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

§ 139. **Kinds of acceptances.**—An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn (*a*).

(*a*) Where a bill is addressed to the drawee in one place, and is accepted payable in another, this is a material variation. Walker *v.* Bank of State of N. Y., 13 Barb. 636; Niagara Bank *v.* Fairman Co., 31 Barb. 403. But a bill addressed generally to a drawee in a city may be accepted payable at a particular bank in that city. Troy City Bank *v.* Lanman, 19 N. Y. 477; Meyers *v.* Standart, 11 Ohio St. 29.

§ 140. **What constitutes a general acceptance.**—An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere (*a*).

(*a*) Before the enactment of the 1 and 2 George IV., c. 78, it was a point much disputed whether, if a bill payable generally was accepted payable at a particular place, such an acceptance was a qualified one. Byles on Bills, 194. The House of Lords finally held that an acceptance payable at a particular place was a qualified acceptance, rendering it necessary, in an action against the acceptor, to aver and prove presentment at such place. Rome *v.* Young, 2 Brod. & Bing. 165; 2 Bligh, 391. This led to the passage of the statute above mentioned, called Sergeant Onslow's act, which provided that an acceptance payable at a particular place should be deemed a general acceptance unless expressed to be payable there "only and not otherwise or elsewhere." In the United States

the weight of authority has been contrary to the decision of the House of Lords, and in favor of the rule as stated in this section. Wallace *v.* McConnell, 13 Peters, 136. See also note to section 70.

§ 141. **Qualified acceptance.**—An acceptance is qualified which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated (*a*);

2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;

3. Local, that is to say, an acceptance to pay only at a particular place;

4. Qualified as to time;

5. The acceptance of some one or more of the drawees, but not of all.

(*a*) Such an acceptance does not become due until the happening of the contingency upon which the bill is accepted. Brockway *v.* Allen, 17 Wend. 40; Newhall *v.* Clark, 3 Cush. 376; Myrick *v.* Merritt, 22 Fla. 335; Marshall *v.* Burnby, 25 Fla. 619.

§ 142. **Rights of parties as to qualified acceptance.**—The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance (*a*). Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notices* of a qualified acceptance, he must within a reasonable time express his dissent to the holder, or he will be deemed to have assented thereto.

(*a*) Cline *v.* Miller, 8 Md. 274. But if he receive such an acceptance he can claim payment only according to the condition or qualification. (*Id.*) An agent for collection, as, for example, a bank, has no authority to receive anything short of an explicit and un-

* Error in engrossing.

qualified acceptance. Walker *v.* New York State Bank, 9 N. Y. 582.

ARTICLE III.*

Presentment for Acceptance.

Section 143. When presentment for acceptance must be made.
144. When failure to present releases drawer and indorser.
145. Presentment; how made.
146. On what days presentment may be made.
147. Presentment: where time is insufficient.
148. When presentment is excused.
149. When dishonored by non-acceptance.
150. Duty of holder where bill not accepted.
151. Rights of holder where bill not accepted.

§ 143. When presentment for acceptance must be made.—Presentment for acceptance must be made:

1. Where the bill is payable after sight or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument (*a*); or

2. Where the bill expressly stipulates that it shall be presented for acceptance; or

3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

(*a*) Although when a bill is made payable at a day certain, as

* The numbers of the sections of this article in other States than Pennsylvania are as follows: Colorado, Connecticut, District of Columbia, Florida, Massachusetts, North Carolina, North Dakota, Oregon, Tennessee, Utah, Virginia and Washington, 162-170; New York, 240-248; Maryland, 162-170; Rhode Island, 151-159; Wisconsin, 1081-1681-8.

at a fixed time after its date, presentment for acceptance before that time is not necessary in order to charge the drawer or indorsers, yet where a bank receives such a bill for collection, its duty is to present the bill for acceptance without delay. For it is to the owner's interest that the bill should be so accepted, as only by accepting it does the drawee become bound to pay it, and until such acceptance the owner has for his debtor only the drawer, and the step is one which a prudent man of business, ordinarily careful of his own interests, would take for his protection. Allen *v.* Suydam, 17 Wend. 368. A bill payable at a fixed period from its date may be presented for acceptance at any time. Bachellor *v.* Priest, 12 Pick. 399; Oxford Bank *v.* Davis, 4 Cush. 188.

§ 144. **When failure to present releases drawer and indorser.**—Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time (*a*). If he fails to do so, the drawer and all indorsers are discharged.

(*a*) Robinson *v.* Ames, 20 Johns. 146; Gowan *v.* Jackson, 20 Johns. 176; Wallace *v.* Agry, 4 Mason, 333; Prescott Bank *v.* Coverly, 7 Gray, 217; Walsh *v.* Dort, 23 Wis. 334; Phœnix Ins. Co. *v.* Allen, 11 Mich. 30; Goupy *v.* Harden, 7 Taunt. 397. A delay of the mail is a sufficient excuse for the omission to immediately present a bill for acceptance; and a presentation immediately after its reception is in time to charge the indorser. Walsh *v.* Blatchley, 6 Wis. 422.

§ 145. **Presentment; how made.**—Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour (*a*), on a business day, and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf (*b*); and

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all (*c*), unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only;

2. Where the drawee is dead, presentment may be made to his personal representative (*d*);

3. Where the drawee has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him or his trustee or assignee.

(*a*) Cayuga County Bank *v.* Hunt, 2 Hill, 635.

(*b*) Byles on Bills, 182. The holder may require the production by the agent of clear and explicit authority from his principal to accept in his name, and without its production may treat the bill as dishonored. Daniel on Negotiable Instruments, section 487.

(*c*) But if one of the drawees accepts he will be bound by his acceptance. Smith *v.* Melton, 133 Mass. 369.

(*d*) Presentment in such case is not necessary. See section 245. Indeed, an executor or administrator has no authority to bind the estate of the decedent by an acceptance. Schmittler *v.* Simon, 101 N. Y. 554. But as it will in most cases be convenient to have the bill duly protested, it is well to have some one designated to whom presentment can be made.

§ 146. **On what days presentment may be made.**—A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections seventy-two and eighty-five of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock noon on that day (*a*).

(*a*) In the Colorado Act the following is substituted for the last sentence: "When any day is in part a holiday, presentment for acceptance may be made during reasonable hours of the part of such day which is not a holiday." In the Wisconsin Act the last sentence is omitted.

§ 147. **Presentment where time is insufficient.**—Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present

the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers.

§ 148. **Where presentment is excused.**—Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance in either of the following cases:

1. Where the drawee is dead (*a*), or has absconded, or is a fictitious person or a person not having capacity to contract by bill;

2. Where after the exercise of reasonable diligence, presentment cannot be made (*b*);

3. Where, although presentment has taken* irregular, acceptance has been refused on some other ground.

(*a*) Prior to the statute there was some doubt as to the proper course in this case. See Daniel on Negotiable Instruments, section 1178. But as the personal representative cannot bind the estate by an acceptance (Schmittler *v.* Simon, 101 N. Y. 554), presentment would be but an idle form.

(*b*) As to what will constitute due diligence, see Sulsbacker *v.* Bank of Charleston, 86 Tenn. 201.

§ 149. **When dishonored by non-acceptance.**—A bill is dishonored by non-acceptance:

1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or

2. When presentment for acceptance is excused and the bill is not accepted.

§ 150. **Duty of holder where bill not accepted.**—Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it

* Through an error in engrossing the word "taken" has been substituted for "been" in the Pennsylvania act.

must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

§ 151. **Rights of holder where bill not accepted.**—When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder, and no presentment for payment is necessary (*a*).

(*a*) Sterry *v.* Robinson, 1 Day (Conn.), 11.

ARTICLE IV.*

PROTEST.

Section 152. In what cases protest necessary.
153. Protest; how made.
154. Protest; by whom made.
155. Protest; when to be made.
156. Protest; where made.
157. Protest both for non-acceptance and non-payment.
158. Protest before maturity where acceptor insolvent.
159. When protest dispensed with.
160. Protest; where bill is lost, et cetera.

§ 152. **In what cases protest necessary.**—Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-accept-

* The numbers of the sections of this article in other States than Pennsylvania are as follows: Colorado, Connecticut, District of Columbia, Florida, Massachusetts, North Carolina, North Dakota, Oregon, Tennessee, Utah, Virginia and Washington, 152-160; New York, 260-268; Maryland, 171-179; Rhode Island, 160-168; Wisconsin, 1681-9-1681-17.

ance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged (*a*). Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary (*b*).

(*a*) Commercial Bank *v.* Varnum, 49 N. Y. 269, 275; Halliday *v.* McDougall, 20 Wend. 81; Dennistoun *v.* Stewart, 17 How. (U. S.) 606; Phœnix Bank *v.* Hussey, 12 Pick. 483. Protest is indispensable, and the proof cannot be supplied in any other way. Joseph *v.* Solomon, 19 Fla. 623. There are several reasons why protest is required in such cases: (1) for the sake of uniformity in international transactions; (2) because it affords satisfactory evidence of dishonor to the drawer, who, from his residence abroad, might experience a difficulty in making inquiries on the subject and be compelled to rely on the representations of the holder; (3) because, as foreign courts give credit to the acts of a public functionary, the protest affords the most satisfactory evidence to charge an antecedent party. Byles, 256.

(*b*) See sections 118 and 129.

§ 153. **Protest; how made.**—The protest must be annexed to the bill, or must contain a copy thereof (*a*), and must be under the hand (*b*) and seal (*c*) of the notary making it, and must specify:

1. The time (*d*) and place (*e*) of presentment;

2. The fact that presentment was made and the manner thereof;

3. The cause or reason for protesting the bill;

4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found (*f*).

(*a*) Fulton *v.* MacCracken, 18 Md. 528.

(*b*) The signature of the notary may be printed. Bank of Cooperstown *v.* Woods, 28 N. Y. 561; Fulton *v.* MacCracken, 18 Md. 528.

(*c*) Donegan *v.* Wood, 49 Ala. 251. In other cases it has been held that the official signature is all that is required. Huffuker *v.*

National Bank, 12 Bush. 293. When the court can perceive that a seal is attached thereto the protest is sufficiently authenticated; neither the seal nor the signature of the notary need be proved. Barry *v.* Crowly, 4 Gill (Md.) 194.

(*d*) In the case of a note, the statement in a notarial certificate that it was presented on a certain day is not conclusive upon the parties, but evidence is admissible to show that presentment was also made on another day. Reynolds *v.* Appleman, 41 Md. 615.

(*e*) A certificate of a notary which states that he presented a note for payment at a certain town and demanded payment, which was refused, but did not state to whom or at what place in the town it was presented, does not show such a presentation to the maker as will bind the indorser. Duckert *v.* Von Lilienthal, 11 Wis. 56.

(*f*) The notarial certificate of protest is competent, without further proof. This has often been so held in respect to foreign bills. Porter *v.* Judson, 1 Gray, 175; Pierce *v.* Indseth, 106 U. S. 546; Browne *v.* Philadelphia Bank, 6 S. & R. 484; Coruth *v.* Walker, 8 Wis. 252. For this purpose the different States of the Union are deemed foreign to each other, so that the notorial certificate of protest under seal is good on mere production. Townsley *v.* Sumrall, 2 Pet. 170; Halliday *v.* McDougall, 20 Wend. 81; Carter *v.* Burley, 9 N. H. 558, 566; Johnson *v.* Brown, 154 Mass. 105, 106. The statement in the certificate that notice of dishonor has been given is also received as evidence. Barry *v.* Crowly, 4 Gill (Md.) 194; Rosson *v.* Carroll, 90 Tenn. 90; Legg *v.* Vinal, 165 Mass. 555. But the notary's certificate is not evidence of other collateral or independent facts it may contain, especially when such facts are not necessarily within the personal knowledge of the notary, or are of such a character as could not be established by his testimony if he were produced as a witness. Weems *v.* Farmers' Bank, 15 Md. 231. Thus, the statement that the party on whom the demand was made was "one of the administrators" of the acceptor does not establish the facts of the death of the acceptor, and of the granting of letters of administration on his estate to such party. (*Id.*) So the words "after diligent search and inquiry to ascertain his whereabouts" are not admissible as evidence of such "diligent search and inquiry" having been made; for this is a conclusion of law which the notary could not legally draw or establish by his own testimony. Reier *v.* Strauss, 54 Md. 278. See also Ricketts *v.* Pendleton, 14 Md. 320; Duckert *v.* Von Lilienthal, 11 Wis. 56; Sumner *v.* Bowen, 2 Wis. 524; Adams *v.* Wright, 14 Wis. 408. A notarial certificate of protest is evidence of the facts therein set

forth, although the notary, when examined, has no recollection of them. Rosson *v.* Carroll, 90 Tenn. 90; Sherer *v.* Easton Bank, 33 Pa. St. 134. And the entries of a deceased notary in his register are admissible. Spann *v.* Baltzell, 1 Fla. 301; Porter *v.* Judson, 1 Gray, 175. When a notary has neglected to keep a record of the notice which he has served on the non-payment of a note, his oral testimony is admissible to prove its contents. Terbell *v.* Jones, 15 Wis. 253. Where the protest is exclusively relied upon to prove the necessary facts to fix liability upon the parties to be affected, it must contain sufficient averments to show that everything requisite has been done on the part of the holder, or his agent, to authorize the demand upon the indorser. People's Bank *v.* Brooke, 31 Md. 7.

§ 154. **Protest; by whom made.**—Protest may be made by:

1. A notary public (*a*); or

2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses (*b*).

(*a*) It would seem that, in the absence of any custom or usage on the subject, the presentment and demand must be made by the notary in person. Commercial Bank *v.* Varnum, 49 N. Y. 269, 275; Ocean Nat. Bank *v.* Williams, 102 Mass. 141. A notary who is an officer of a bank may legally protest paper belonging to the bank. Nelson *v.* First National Bank, 69 Fed. Rep. 798; 29 U. S. 554; 16 C. C. A. 425. And though he is also a stockholder in the bank. Moreland's Assignee *v.* Citizens' Savings Bank, (Ky.) 30 S. W. Rep. 19. And it has been held that the cashier of a bank who is a notary may legally protest his own note which has been discounted by the bank. Dykman *v.* Northridge, 1 App. Div. 26.

(*b*) Todd *v.* Neal's Administrator, 49 Ala. 273.

§ 155. **Protest; when to be made.**—When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting (*a*).

(*a*) The protest should be commenced, at least (and such an incipient protest is called noting), on the day on which acceptance or payment is refused; but it may be drawn up and completed at any time before the commencement of the suit, or even before or during the trial, and ante-dated accordingly. Byles on Bills, 257.

§ 156. **Protest; where made.**—A bill must be protested at the place where it is dishonored (*a*), except that when a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary (*b*).

(*a*) See Daniel on Neg Inst., section 935; Byles on Bills, 257.
(*b*) 3 William IV. Ch. 98; Daniel on Neg. Inst., section 935; Byles on Bills, 258.

§ 157. **Protest both for non-acceptance and non-payment.**—A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

§ 158. **Protest before maturity where acceptor insolvent.**—Where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

§ 159. **When protest dispensed with.**—Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

§ 160. **Protest where bill is lost, et cetera.**—When a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof (*a*).

(*a*) Hinsdale *v.* Miles, 5 Conn. 331. Loss of the instrument does not excuse demand and protest. Daniel on Negotiable Instruments, section 1464. See also section 148.

ARTICLE V.*

Acceptance for Honor.

Section 161. When bill may be accepted for honor.
162. Acceptance for honor; how made.
163. When deemed to be an acceptance for honor of the drawer.
164. Liability of acceptor for honor.
165. Agreement of acceptor for honor.
166. Maturity of bill payable after sight; accepted for honor.
167. Protest of bill accepted for honor, et cetera.
168. Presentment for payment to acceptor for honor; how made.
169. When delay in making presentment is excused.
170. Dishonor of bill by acceptor for honor.

§ 161. **When bill may be accepted for honor.**—Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security and is not overdue, any person not being a party already liable thereon

* The numbers of the sections of this article in other States than Pennsylvania are as follows: Colorado, Connecticut, District of Columbia, Florida, Massachusetts, North Carolina, North Dakota, Oregon, Tennessee, Utah, Virginia and Washington, 161-170; New York, 280-289; Maryland, 180-189; Rhode Island, 169-178; Wisconsin, 1681-18-1681-27.

may, with the consent of the holder, intervene and accept the bill supra protest for the honor of any party liable thereon or for the honor of the person for* whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party (*a*).

(*a*) Byles on Bills, 262-266.

§ 162. **Acceptance for honor; how made.**—An acceptance for honor supra protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

§ 163. **When deemed to be an acceptance for honor of the drawer.**—Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

§ 164. **Liability of acceptor for honor.**—The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted (*a*).

(*a*) The acceptor for the honor of the drawer cannot maintain an action thereon against him without proof of its presentment to the drawee and non-acceptance or non-payment by him, and notice thereof to the drawer. Baring *v.* Clark, 19 Pick. 220.

§ 165. **Agreement of acceptor for honor.**—The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also that it shall have been duly pre-

* The word "for" omitted in the original New York Act supplied by Laws 1898, c. 336.

sented for payment and protested for non-payment and notice of dishonor given to him.

§ 166. **Maturity of bill payable after sight; accepted for honor.**—Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

§ 167. **Protest of bill accepted for honor, et cetera.**—Where a dishonored bill has been accepted for honor supra protest or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

§ 168. **Presentment for payment to acceptor for honor; how made.**—Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity;

2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section one hundred and four (*a*).

(*a*) Doubts having arisen as to the day when the bill should be again presented to the acceptor for honor, or referee in case of need, for payment, the 6 and 7 Will. 4, c. 58, enacted that it should not be necessary to present, or in case the acceptor for honor or referee live at a distance, to forward for presentment, till the day following that on which the bill becomes due. Byles on Bills, 263.

§ 169. **When delay in making presentment is excused.**—The provisions of section eighty-one apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

§ 170. **Dishonor of bill by acceptor for honor.**—When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

ARTICLE VI.*

PAYMENT FOR HONOR.

Section 171. Who may make payment for honor.
172. Payment for honor; how made.
173. Declaration before payment for honor.
174. Preference of parties offering to pay for honor.
175. Effect on subsequent parties where bill is paid for honor.
176. Where holder refuses to receive payment supra protest.
177. Rights of payer for honor.

§ 171. **Who may make payment for honor.**—Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn (*a*).

(*a*) Byles on Bills, 267-269; Daniel on Neg. Inst., section 1254.

§ 172. **Payment for honor; how made.**—The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor, which may be appended to the protest or form an extension to it (*a*).

* The numbers of the sections of this article in other States than Pennsylvania are as follows: Colorado, Connecticut, District of Columbia, Florida, Massachusetts, North Carolina, North Dakota, Oregon, Tennessee, Utah, Virginia and Washington, 171-177; New York, 300-306; Rhode Island, 179-185; Maryland, 190-196; Wisconsin, 1681-28-1681-34.

(*a*) Byles on Bills, 267; Daniel on Neg. Inst., section 1258. A stranger to the drawer and indorser of a non-accepted bill may intervene supra protest, to pay the same for the honor of the indorser or drawer. Konig *v.* Bayard, 1 Pet. 250. And it is no objection to this intervention that it has been done at the request and under the guarantee of the drawer who had refused acceptance or payment. (*Id.*)

§ 173. **Declaration before payment for honor.**—The notarial act of honor must be founded on a declaration made by the payer for honor, or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

§ 174. **Preference of parties offering to pay for honor.**—Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

§ 175. **Effect on subsequent parties where bill is paid for honor.**—Where a bill has been paid for honor all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter (*a*).

(*a*) Daniel on Neg. Inst., section 1255.

§ 176. **Where holder refuses to receive payment supra protest.**—Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment.

§ 177. **Rights of payer for honor.**—The payer for honor, on paying to the holder the amount of the bill and

the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

ARTICLE VII.*

Bills in a Set.

Section 178. Bills in sets constitute one bill.
179. Rights of holders where different parts are negotiated.
180. Liability of holder who indorses two or more parts of a set to different persons.
181. Acceptance of bills drawn in sets.
182. Payment by acceptor of bills drawn in sets.
183. Effect of discharging one of a set.

§ 178. **Bills in sets constitute one bill.**—Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitutes one bill (*a*).

(*a*) Byles on Bills, 387; Daniel on Neg. Inst., section 113; Durkin *v.* Cranston, 7 Johns. 442.

§ 179. **Rights of holders where different parts are negotiated.**—Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill (*a*). But nothing in this section affects the rights

* The numbers of the sections of this article in other States than Pennsylvania are as follows: Colorado, Connecticut, District of Columbia, Florida, Massachusetts, North Carolina, North Dakota, Oregon, Tennessee, Utah, Virginia and Washington, 178-183; New York, 310-315; Maryland, 197-202; Rhode Island, 186-191; Wisconsin, 1681-35-1681-40.

of a person who in due course accepts or pays the part first presented to him.

(*a*) Byles on Bills, 389; Walsh *v.* Blatchley, 6 Wis. 422.

§ 180. **Liability of holder who indorses two or more parts of a set to different persons.**—Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills (*a*).

(*a*) Holdsworth *v.* Hunter, 10 C. B. 449; Byles on Bills, 389.

§ 181. **Acceptance of bills drawn in sets.**—The acceptance may be written on any part, and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill (*a*).

(*a*) Holdsworth *v.* Hunter, 10 C. B. 449; Byles on Bills, 389. Either of the set may be presented for acceptance, and if not accepted a right of action arises, upon due notice, against the indorser. Downes & Co. *v.* Church, 13 Peters, 205; Walsh *v.* Blatchley, 6 Wis. 422, 425.

§ 182. **Payment by acceptor of bills drawn in sets.**—When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon (*a*).

(*a*) Byles on Bills, 389.

§ 183. **Effect of discharging one of a set.**—Except as herein otherwise provided, where any one part of a bill

drawn in a set is discharged by payment or otherwise the whole bill is discharged (*a*).

(*a*) Byles on Bills, 388. The Wisconsin Act contains an additional article, as follows:

Section 1682. Whenever any bill of exchange drawn or indorsed within this State and payable without the limits of the United States shall be duly protested for non-acceptance or non-payment the party liable for the contents of such bill shall, on due notice and demand thereof, pay the same at the current rate of exchange at the time of the demand, and damages at the rate of five per cent. upon the contents thereof, together with interest on the said contents, to be computed from the date of the protest; and said amount of contents, damages and interest shall be in full of all damages, charges and expenses.

§ 1683. If any bill of exchange drawn upon any person or corporation out of this State, but within some State or Territory of the United States, for the payment of money shall be duly presented for acceptance or payment and protested for non-acceptance or non-payment the drawer or indorser thereof, due notice being given of such non-acceptance or non-payment, shall pay said bill, with legal interest according to its tenor and five per cent. damages, together with costs and charges of protest.

CHAPTER III.

Promissory Notes and Checks.

ARTICLE I.*

Section 184. Promissory note defined.
185. Check defined.
186. Within what time a check must be presented.
187. Certification of check; effect of.
188. Effect where holder of check procures it to be certified.
189. When check operates as an assignment.

* The numbers of the sections of this article in other States than Pennsylvania are as follows: Colorado, Connecticut, District of Columbia, Florida, Massachusetts, North Carolina, North Dakota, Oregon, Tennessee, Utah, Virginia and Washington, 184-189; New York, 320-325; Maryland, 203-208; Rhode Island, 102-197; Wisconsin, 1684-1684-5.

§ 184. **Promissory note defined.**—A negotiable promissory note within the meaning of this act is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer (*a*). Where a note is drawn to the maker's own order, it is not complete until indorsed by him (*b*).

(*a*) This section makes a change in the law of New York as regards the presumption of consideration in the case of non-negotiable notes. The terms of the former New York statute included a note payable to a person named therein without words of negotiability. Carnwright *v.* Gray, 127 N. Y. 92. But as that statute has been repealed, and as the provisions of the Negotiable Instrument Law apply only to negotiable promissory notes, it is now necessary to prove consideration in actions upon non-negotiable notes. Deyo *v.* Thompson, 53 App. Div. (N. Y.) 12. The rules on the subject have differed in the different States. See Daniel on Negotiable Instruments, section 163. In Connecticut the act has made no change in the law; for the rule in that State has been that a non-negotiable note does not import a consideration. Bristol *v.* Warner, 19 Conn. 17. A certificate of deposit issued by a banker in the ordinary form of such instruments is, in substance and legal effect, a negotiable promissory note. Curran *v.* Witter, 68 Wis. 16; Maxwell *v.* Agnew, 21 Fla. 154. And so are coupons payable to bearer. Trustees of the I. I. Fund. *v.* Lewis, 34 Fla. 424.

(*b*) A note payable to the order of the maker is a negotiable note. Miller *v.* Weeks, 22 Pa. St. 89. Under the former statute in New York the indorsement of the maker was not necessary. Irving National Bank *v.* Alley, 79 N. Y. 536. Where a promissory note payable to the order of the maker is indorsed by him, the indorsement does not change or affect the nature and character of his liability. Madison Square Bank *v.* Pierce, 137 N. Y. 444.

§ 185. **Check defined.**—A check is a bill of exchange drawn on a bank (*a*), payable on demand (*b*). Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check (*c*).

(*a*) One of the characteristics which distinguish a check from a bill of exchange is that a check is always drawn on a bank or banker. Harris *v.* Clark, 3 N. Y. 93, 115; In the matter of Brown, 2 Story's Rep. 502. See also Bull *v.* Bank of Kasson, 123 U. S. 105; Rogers *v.* Durant, 140 U. S. 298; Espy *v.* Bank of Cincinnati, 18 Wall. 620; Merchants' Bank *v.* State Bank, 10 Wall. 604; Chapman *v.* White, 6 N. Y. 412; Harker *v.* Anderson, 21 Wend. 373; Murray *v.* Judah, 6 Cow. 484; Cruger *v.* Armstrong, 3 Johns. 5; Ridgeley Bank *v.* Patton, 109 Ill. 484; Harrison *v.* Nicollet Nat. Bank, 41 Minn. 489; Northwestern Coal Co. *v.* Bowman, 69 Iowa, 152; Planters' Bank *v.* Keese, 7 Heisk. 200; Blair *v.* Wilson, 28 Gratt. 170; Dodd *v.* Jette, 10 Oregon 31; Hopkinson *v.* Forster, L. R. 18 Eq. 74.

(*b*) There has been some conflict in the decisions as to whether a draft upon a bank not payable immediately was a check or bill of exchange. The latter view was adopted in New York. Bowen *v.* Newell, 8 N. Y. 190; 13 N. Y. 390. To the same effect also are the following cases: Ivory *v.* Bank of the State, 36 Mo. 475; Harrison *v.* Nicollet National Bank, 41 Minn. 488; Georgia National Bank *v.* Henderson, 46 Ga. 496; Minturn *v.* Fisher, 4 Cal. 36; Morrison *v.* Bailey, 5 Ohio St. 13. *Contra:* Champion *v.* Gordon, 70 Pa. St. 474; Westminster Bank *v.* Wheaton, 4 R. I. 30; *In re* Brown, 2 Story, 502. In all of these cases the particular question presented was whether the instrument was entitled to grace. But now that grace has been abolished the distinction is of little, if any, practical importance.

(*c*) Bill *v.* Stewart, 156 Mass. 508; Ames *v.* Meriam, 98 Mass. 294. Presentment and notice of dishonor are necessary in order that the holder may recover of the drawer. Herker *v.* Anderson, 21 Wend. 372; Dolph *v.* Rice, 18 Wis. 397. But unless the check answers the description of a foreign bill protest is not necessary. Wittich *v.* First Nat. Bank of Pensacola, 20 Fla. 843. See Sec. 189.

§ 186. **Within what time a check must be presented.** —A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay (*a*).

(*a*) The holder's laches in presenting a check for payment con-

stitutes no defense in an action against the drawer unless he is damaged by the delay, and then only to the extent of his loss. A check purports to be made upon a deposit to meet it, and presupposes funds of the drawer in the hands of the drawee. But if the drawer has no such funds at the time of drawing his check, or subsequently withdraws them, he commits a fraud upon the payee, and can suffer no loss or damage from the holder's delay in respect to presentment or notice. In such case he is liable and cannot insist upon a formal demand or notice of non-payment. First National Bank of Portland *v.* Linn County National Bank, 30 Oregon 296; Industrial Bank of Chicago *v.* Bowes, 165 Ill. 70. For instances of unreasonable delay see Industrial Trust, Title and Savings Co. *v.* Weakley, 103 Ala. 458; Gifford *v.* Hardell, 88 Wis. 538; First National Bank of Wymore *v.* Miller, 43 Neb. 791; Comer *v.* Dufour, 95 Ga. 376; Grange *v.* Reigh, 93 Wis. 552; Western Wheeled Scraper Co. *v.* Sadilek, 50 Neb. 105; Gregg *v.* Beane, 69 Vt. 22; Holmes *v.* Roe, 62 Mich. 199. For instances of presentment in due time, see Loux *v.* Fox, 171 Pa. St. 68; Willis *v.* Finley, 173 Pa. St. 28; First Nat. Bank *v.* Buckhannon Bank, 80 Md. 475; Lloyd *v.* Osborne, 92 Wis. 93; Bell *v.* Alexander, 21 Gratt. 1; Purcell *v.* Allemong, 22 Gratt. 739. But while, as between the holder and drawer of a check, presentment may be made at any time, and delay in presentment does not discharge the drawer, unless loss has resulted to him, a different rule obtains as between holder and indorser. The holder, on accepting the check, assumes the obligation to present the same for payment within the time prescribed by law, and if payment is refused to give notice of non-payment. A failure to do this discharge the indorser from liability as such irrespective of any question of loss or injury. Carroll *v.* Swift, 128 N. Y. 19. It is not clear whether the death of the drawer revokes the authority of the bank to pay a check. There is no decision directly in point, and the views of the text writers differ. To meet the difficulty, the original draft of the Negotiable Instruments Law submitted to the commissioners contained a provision (which was taken from the statute of Massachusetts) as follows: "The death of the drawer does not operate as a revocation of the authority to pay a check, if the check is presented for payment within ten days from the date thereof." But it was thought by the conference of commissioners that this would be objected to in some of the States because of the effect it might have on the estates of decedents.

187. Certification of check; effect of.—Where a check is certified by the bank on which it is drawn the certification is equivalent to an acceptance (*a*).

(*a*) See Merchants' Bank *v.* State Bank, 10 Wall. 648; Cooke *v.* State Nat. Bank, 52 N. Y. 96; Farmers' and Mechanics' Bank *v.* Butchers' and Drovers' Bank, 16 N. Y. 125. The certification does not admit the genuineness of the indorser's signature. First Nat. Bank *v.* Northwestern Nat. Bank, 152 Ill. 296. As to the liabilities incurred, see section 112.

§ 188. Effect where the holder of check procures it to be certified.—Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon (*a*).

(*a*) See Minot *v.* Russ, 156 Mass. 458; Metropolitan Bank *v.* Jones, 137 Ill. 634; Meridian Nat. Bank *v.* First Nat. Bank (Ind.), 33 N. E. Rep. 247; First Nat. Bank *v.* Leach, 52 N. Y. 350. The bank, for its own protection, usually charges up the check, when certified, to its depositor; and, as the drawer cannot thereafter check against the same fund, it would be unjust that the money should be left in the bank at his risk and he remain liable upon the extended check. Bank *v.* Carter, 88 Tenn. 279. But where the check is certified when delivered it does not constitute payment any more than an uncertified check; and if it is presented promptly and dishonored, the loss must fall upon the drawer. Born *v.* First Nat. Bank, 123 Ind. 78; Cincinnati Oyster & Fish Co. *v.* Nat. Lafayette Bank, 51 Ohio St. 106; Bank *v.* Carter, *supra*.

§ 189. When check operates as an assignment.—A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check (*a*).

(*a*) As to this there is considerable conflict in the authorities. The rule adopted in the act is supported by the weight of authority. See Bank *v.* Millard, 10 Wall. 152; Bank *v.* Schuler, 120 U. S. 511; Florence Mills Co. *v.* Brown, 124 U. S. 385; First Nat. Bank *v.*

Whitman, 94 U. S. 343, 344; St. L. & S. F. Ry. Co. *v.* Johnston, 133 U. S. 566; Attorney-General *v.* Continental Life Insurance Co., 71 N. Y. 325, 330; First Nat. Bank of Union Mills *v.* Clark, 134 N. Y. 368; O'Connor *v.* Mechanics' Bank, 124 N. Y. 324; Maginn *v.* Dollar Savings Bank, 131 Pa. St. 362; Saylor *v.* Bushong, 100 Pa. St. 27; Covert *v.* Rhodes, 48 Ohio St. 66; Cincinnati H. & D. R. R. Co. *v.* Metropolitan Nat. Bank, 54 Ohio St. 60; Pickle *v.* People's Nat. Bank, 88 Tenn. 380; Boetcher *v.* Colorado Nat. Bank, 15 Col. 16; Hopkinson *v.* Foster L. R., 18 Eq. 74. *Contra:* Fonner *v.* Smith, 31 Neb. 107; Munn *v.* Burch, 25 Ill. 35; Bank *v.* Patton, 109 Ill. 479, 485; Doty *v.* Caldwell (Tex.), 38 S. W. Rep. 1025; Nat. Bank of America *v.* Nat. Bank of Ill. 164 Ill. 503. But while the mere making and delivery of a check in the ordinary course of business does not operate as an assignment of the fund, it is yet competent for the parties to create such an assignment by a clear agreement or understanding, oral or otherwise, in addition to the giving of the check that such shall be the effect of the transaction. Fourth Street National Bank *v.* Yardley, 165 U. S. 634; Throop Grain Cleaner Co. *v.* Smith, 110 N. Y. 83, 88.

CHAPTER IV.

General Provisions.

ARTICLE I.*

Section 190. Short title.
191. Definitions and meaning of terms.
192. Person primarily liable on instrument.
193. Reasonable time, what constitutes.
194. Time, how computed; when last day falls on holiday.
195. Application of chapter.
196. Rule of law merchant; when governs.
197. Laws repealed.
198. When to take effect.

* The numbers of the sections of this article in other States than Pennsylvania are as follows: Colorado, Massachusetts, North Carolina, North Dakota, Utah, Virginia and Washington, 190-196; New York, 1-7; Maryland, 13-19; Oregon, 190-192; Rhode Island, 1-7; Wisconsin, 1675. In Connecticut, District of Columbia, Florida and Tennessee these sections are not numbered.

§ 190. **Short title.**—This act shall be known as the negotiable instruments law (*a*).

(*a*) The law is confined to negotiable instruments. No attempt is made to deal with instruments which are non-negotiable; and they are not governed by the statute. In determining whether the rules of the statute will apply to any particular instrument, it is first necessary to ascertain whether such instrument is negotiable, according to the terms of the statute. In many instances the rules will be the same for instruments of either kind; but that is not because instruments which are non-negotiable are governed by the statute, but because the statute is a codification of common law rules which before its adoption applied equally to both classes of instruments. In other words, a negotiable instrument is governed by the statute and a non-negotiable instrument by the rules of the common law, though frequently these rules will be the same. For example, if a note drawn payable at a bank contains terms which render it non-negotiable, the provision of section 87, that "where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon," would not apply; but the case would be governed by the rule of the common law, which is the same as the statutory rule in some of the States, but different in others. This distinction must be carefully borne in mind, or much confusion will result.

§ 191. **Definitions and meaning of terms.**—In this act, unless the context otherwise requires:

"Acceptance" means an acceptance completed by delivery or notification.

"Action" includes counter-claim and set-off.

"Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not.

"Bearer" means the person in possession of a bill or note which is payable to bearer.

"Bill" means bill of exchange, and "note" means negotiable promissory note.

"Delivery" means transfer of possession, actual or constructive, from one person to another.

"Holder" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

"Indorsement" means an indorsement completed by delivery.

"Instrument" means negotiable instrument.

"Issue" means the first delivery of the instrument, complete in form, to a person who takes it is* a holder.

"Person" includes a body of persons, whether incorporated or not.

"Value" means valuable consideration.

"Written" includes printed, and "writing" includes print.

§ 192. **Person primarily liable on instrument.**—The person "primarily" liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable (*a*).

(*a*) This section is to be construed in connection with section 37, which provides that "no person is liable on the instrument whose signature does not appear thereon;" and also with section 211, which provides that "the drawee is not liable on the bill unless and until he accepts the same;" and with section 325, which provides that "the bank is not liable to the holder unless and until it accepts or certifies the check." These are not, by the terms of the instrument, absolutely required to pay the same until such acceptance or certification.

§ 193. **Reasonable time, what constitutes.**—In determining what is a "reasonable time" or an "unreasonable time," regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case (*a*).

(*a*) Where the facts are doubtful or disputed, the question of reasonable time is a mixed question of law and fact. But when the facts are clear and undisputed, the question is one of law for the

* Error in engrossing for "as."

court. Prescott Bank *v.* Coverly, 7 Gray, 217; Gilmore *v.* Wilbur, 12 Pick. 124; Holbrook *v.* Burt, 22 Pick. 555; Northwestern Coal Co. *v.* Bowman, 69 Iowa, 153; Aymar *v.* Beers, 7 Cow. 705; Tomlinson Carriage Co. *v.* Kinsella, 31 Conn. 273.

§ 194. **Time, how computed; when last day falls on holiday.** — Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.

§ 195. **Application of chapter.**—The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof.

§ 196. **Law merchant; when governs.**—In any case not provided for in this act the rules of the law merchant shall govern.

§ 197. **Laws repealed.**—All acts or parts of acts inconsistent herewith be and the same are hereby repealed.

§ 198. **When to take effect.**—This act shall take effect on the first Monday of September, Anno Domini nineteen hundred and one.

INDEX.

(The references are to pages.)

ACCEPTANCE, meaning of term, 145.
what it is, 117, 118.
must be in writing, 118.
must be signed, 118.
holder may require it to be on face of bill, 118.
must be for payment in money, 118.
is new contract, 118.
form of, 118.
signature of drawee sufficient, 118.
by separate instrument, 118.
when acceptance on separate instrument binds acceptor, 118.
promise to accept deemed acceptance, 119.
by telegraph, 119.
by what law promise to accept governed, 119.
at common law oral promise was sufficient, 119.
acceptance by agent, 119.
time allowed drawee in which to accept, 120.
when retention of bill amounts to acceptance, 120.
where bill overdue, 120, 121.
after bill dishonored, 120, 121.
of incomplete bill, 120, 121.
date of acceptance, 120.
kinds of acceptance, 121.
what constitutes general acceptance, 121.
qualified acceptance, 121, 122.
conditional, 122.
local, 122.
partial, 122.
agent cannot take qualified acceptance, 122.
executor has no authority to accept, 125, 126.
duty of holder where bill dishonored by non-acceptance, 126.

ACCEPTANCE—*Continued.*
when bill dishonored by non-acceptance, 126.
what bills must be protested for non-acceptance, 127, 128.
of bills in set, 138.
ACCEPTANCE FOR HONOR, when bill may be accepted for honor, 132, 133.
how made, 133.
for part of sum, 133.
for different parties, 133.
when acceptance does not state for whose honor made, 133.
agreement of acceptor for honor, 133.
liability of acceptor for honor, 133.
maturity of bill payable after sight accepted for honor, 134.
how presentment for payment made to acceptor for honor, 134.
dishonor of bill accepted for honor, 135.
when delay in making presentment excused, 134, 135.
ACCEPTOR, by accepting admits existence of drawer, 61.
admits genuineness of drawer's signature, 61, 62.
admits drawer's capacity to draw, 61.
admits authority to draw, 61.
admits capacity of corporation to draw bill, 62.
admits capacity of married woman, 62.
admits capacity of infant, 62.
may not show that drawer is a lunatic, 62.
not presumed to know signature of indorser, 62.
not presumed to know handwriting in body of bill, 62.
liability of acceptor, 61-63.
demand of payment not necessary in order to charge, 72.
when acceptor insolvent bill may be protested for better security, 131.
ACCEPTOR FOR HONOR, liability of acceptor for honor, 105.
agreement of acceptor for honor, 133.
ACCOMMODATION PAPER no implied warranty that bill is not, 67.
notes mutually exchanged are not, 37.
payment of by party accommodated discharges paper, 200.
ACCOMMODATION PARTIES, liability of, 36.
right to retract, 37.
right to impose conditions, 38.
discharge of by diversion of instrument, 37.

ACCOMMODATION PARTIES—*Continued.*
corporations cannot make, 37.
rights of on payment of instrument, 110.
ACTION, meaning of, 145.
restrictive indorsement confers right to bring, 43.
AGENT, signature by, 28, 29.
authority of, 28.
how authority shown, 28.
liability of person signing as agent, 28, 71.
may give notice of dishonor, 88, 89.
notice of dishonor may be given to, 92.
cannot take qualified acceptance, 122, 123.
duty of to present bill for acceptance, 123, 124.
holder may require production of his authority to accept, 125.
ALTERATION, effect of, 112, 113.
holder in due course may enforce instrument according to original tenor, 112.
what constitutes a material alteration, 113.
burden of explaining, 112, 113.
pleading and evidence, 113.
as to date, 113, 114.
as to sum payable, 113, 114.
as to time of payment, 113, 114.
as to place of payment, 113, 114.
as to number of parties, 113, 114.
as to relation of parties, 113, 114.
as to medium of payment, 113, 114.
addition of place of payment, 113, 114.
other changes, 113, 114.
AMBIGUOUS INSTRUMENT, construction of, 25-27.
ANTECEDENT DEBT, constitutes value, 32-34.
ANTEDATED, instrument not invalid because, 21.
ASSIGNMENT, bill is not, 115.
when bill may amount to, 115, 116.
check is not, 143, 144.
when check may amount to, 144.
ASSUMED NAME, persons signing in, 27.
ATTORNEY'S FEE, provision for, 10, 11.

BANK, meaning of, 145.
instrument payable at equivalent to order to pay, 85.

BANK—*Continued.*
presentment of instrument payable at, 77, 78.
duty of to present bill for acceptance, 123, 124.
liability of on certified check, 143.
not liable on check unless it accepts or certifies the same, 143, 144.
BANK NOTES, note payable in, 17.
BEARER, meaning of term, 145.
instrument must be payable to or order, 19.
when instrument be payable to, 19-21.
instrument payable to person named or bearer, 19.
instrument payable to fictitious person, 19.
when payee not name of any person, 19.
when indorsed in blank, 19.
instrument payable to cash is payable to, 20.
instrument payable to sundries is payable to, 20.
instrument payable to estate, 20.
indorsement of instrument payable to, 45, 69.
in some States indorsement required, 69.
BILL, meaning of term, 145.
BILLS IN A SET constitute one bill, 137.
rights of holder where different parts are negotiated, 137, 138.
liability of indorser, 138.
acceptance of, 138.
payment of, 138.
effect of discharging one of a set, 138.
BILL OF EXCHANGE, term "bill" means bill of exchange, 145.
ambiguous instrument may be considered either bill or note, 26.
definition of, 115.
is not an assignment, 115.
where drawer and drawee are same person, 116.
may be addressed to two or more drawees, 116.
but not to two or more in the alternative, 116.
inland bill, what constitutes, 116.
foreign bill, what constitutes, 116.
when bill may be treated as promissory note, 116.
when bill may amount to an assignment, 116.
referee in case of need, 117.
BLANKS, when may be filled, 22.

BLANKS—*Continued.*
when improperly filled, 22, 23.
no authority to fill where instrument has not been delivered, 24.
BOHEMIAN OATS NOTES, provisions as to, 17.
BONDS, liability of person negotiating, 66, 67.
BROKER, liability of, 71.
BURDEN OF PROOF, where title of prior party was defective, 59.

CANCELLATION discharges instrument, 106.
effect of, 112.
burden of proof, 112.
CAPACITY, acceptance admits capacity of drawer to draw bill, 62, 63.
warranty where negotiation by delivery, 65, 66.
warrant of by general indorser, 66, 68.
"CASH," instrument payable to, 20.
CASHIER, instrument payable to, 46.
not disqualified to act as notary, 130.
CERTIFICATION, effect of, 143.
where holder has check certified, 143.
where drawer has check certified, 143.
CHECK defined, 140.
difference between check and bill, 141.
presentment and notice of dishonor necessary, 141.
within what time must be presented, 141, 142.
effect of delay, 141, 142.
certification of, 143.
is not assignment, 143, 144.
agreement for assignment by, 144.
COLLATERAL SECURITIES, provision for sale of, 14, 15.
must be tendered with instrument, 78.
holder receiving collaterals not required to proceed upon before suing indorser, 83.
"COLLECTION," indorsement for, 42.
effect of, 42.
liability of indorser, 42.
CONDITIONAL INDORSEMENT, party paying may disregard condition, 44, 45.
indorsee holds subject to rights of indorser, 44, 45.
CONFESSION OF JUDGMENT, provision for, 14, 15.

CONFLICT OF LAWS, by what laws demand of payment determined, 73.
by what law validity of promise to accept determined, 119, 120.
CONSIDERATION, presumption as to, 32.
what constitutes, 32.
antecedent debt is, 30-34.
absence or failure of is defense, 35.
partial failure of is defense *pro tanto,* 35.
accommodation parties, 36.
presumption as to in case of non-negotiable note, 32, 140.
CONTINGENCY, instrument payable on is not negotiable, 13
CORPORATION included in word "person," 5.
indorsement by, 29.
delivery of paper of by officer for personal debt, 55.
acceptor admits capacity of to draw, 62.
indorser admits capacity of to make note, 67.
CURRENT MONEY, designation of particular kind of, 16, 17.

DATE, absence of does not affect validity of instrument, 16.
presumption as to date, 21, 26.
evidence to show mistake as to date, 21.
instrument may be ante-dated, 21.
may be post-dated, 21.
when date may be inserted, 22.
insertion of wrong date, 22.
alteration of date, 113, 114.
from what date law takes effect, 147.
DAYS OF GRACE, abolished, 84.
rule in Wisconsin, 84.
rule in North Carolina, 84.
restored in Massachusetts, 84.
DEFENSES, when instrument subject to, 57-59.
nature of, 58.
who liable to, 57-58.
DELAY, when delay in presenting for payment is excused, 80, 81.
in giving notice of dishonor, 101, 102.
in presenting check, 141, 142.
DELIVERY, meaning of term, 145.
of incomplete instrument, 24.
contract revocable until delivery, 24.

DELIVERY—*Continued.*
presumption as to delivery, 24, 25.
necessary to convey title, 39.
evidence to show terms of delivery, 40.
is negotiation of instrument payable to bearer, 39.
of bill or check implies representation that drawee is in funds, 62, 63.
warranty where negotiation by delivery, 62, 63.
DEMAND, INSTRUMENT PAYABLE ON, instrument must be payable on or at determinable future time, 9.
instrument expressed to be payable on, 17.
payable at sight, 17.
payable on presentation, 17.
when no time expressed, 17.
instrument issued, etc., when overdue is payable on demand, 17.
distinction between and instruments payable on demand and at sight, 18.
when words "on demand" may be added, 17.
legal intendment cannot be changed by parol, 18.
instrument payable on demand negotiated an unreasonable time after its issue, 52.
overdue bill is payable on, 18, 74.
when instrument payable on demand must be presented, 73-75.
DETERMINABLE FUTURE TIME, instrument must be payable at, 9.
what is, 13.
fixed period after date or sight is, 13.
on or before fixed time is, 13.
on or after event certain to happen is, 13.
DISCHARGE OF INSTRUMENT by payment on behalf of principal debtor, 106.
where principal debtor becomes holder after maturity, 106.
by cancellation, 106.
by other act, 106.
by payment by party accommodated, 106.
of one part of a bill drawn in a set, 138, 139.
DISCHARGE OF PARTY SECONDARILY LIABLE by discharge of instrument, 107.
by cancellation of signature, 107.
by discharge of prior party, 107, 108.

DISCHARGE OF PARTY SECONDARILY LIABLE—*Continued.*
by tender by prior party, 107, 108.
by release of principal debtor, 107.
where holder applies collateral security, 108.
where holder has means of satisfaction, 108.
reservation of right against surety, 107, 108.
extension of time, when will discharge, 107, 109.
mere indulgence will not discharge, 109.
where holder allows statute of limitations to run against principal debtor, 108.
DRAWEE must be named or indicated in instrument, 9.
not liable until acceptance, 115.
bill may be addressed to two or more, 116.
but not to two or more in the alternative, 116.
time allowed in which to accept, 120.
retaining or destroying bill is liable as acceptor, 120.
DRAWER, instrument payable to order of, 18.
engagement of by drawing bill, 61.
admission of, 61.
liability of, 61.
may negative liability, 61.
existence of admitted by acceptor, 61.
when presentment not necessary to charge, 80.
right of recourse to, 83.
notice of dishonor must be given to, 87.
when notice of dishonor need not be given to, 103.
when released by failure to present bill for acceptance, 124.
liability of where bill dishonored by non-acceptance, 127.
when protest necessary in order to charge, 127, 128.
of check discharged if holder has check certified, 143.
DUE DILIGENCE, when question of law, 81, 102.
when question of fact, 81.
what will constitute, 83, 84.
DURESS, instrument or signature obtained by, 53.

EVIDENCE, admissibility of evidence to show agreement among indorsers, 70.
EXCHANGE, provision for, 10.
EXHIBITION OF INSTRUMENT, when necessary, 77, 78.
when excused, 78.

FICTITIOUS PERSON, instrument payable to order of is payable to bearer, 20, 61.
whether instrument payable to order of estate is, 20.
presentment for payment not required where drawee is fictitious person, 81.
FIGURES, where there is a discrepancy between words and figures, 26.
FISCAL OFFICER, instrument payable to, 46.
FOREIGN BILL, what is, 116.
FORGED SIGNATURE confers no right, 30.
when party estopped to allege forgery, 30.
FRAUD, instrument or signature obtained by, 53.

GENUINENESS, warranty of where negotiation by delivery, 66.
warranty of where negotiation by qualified indorsement, 66.
when warranty of not implied, 66.
warranty of by general indorser, 68.
acceptor admits signature of drawer, 61, 62.
acceptance does not admit signature of indorser, 61, 62.
nor handwriting in body of instrument, 62.
GOLD COIN, note payable in, 17.
GUARANTOR, person may become such, 63.
when proceedings against principal are necessary, 88.
not entitled to notice of dishonour, 88.
GUARANTY, conditional guaranty, 83.

HOLDER, meaning of term, 146.
may sue in his own name, 50.
may receive payment, 50.
rights of where bill discharged by non-acceptance, 126, 127.
duty of where bill not accepted, 126, 127.
refusal to receive payment for honor, 136.
by having check certified discharges drawer and indorsers, 143.
of check cannot recover of bank on check until it accepts or certifies the same, 143, 144.
HOLDER FOR VALUE, what constitutes, 34.
person having lien is, 34.
HOLDER IN DUE COURSE, what constitutes, 50-52.
who is not, 50-52.

HOLDER IN DUE COURSE—*Continued.*
in case of instrument payable on demand, 50-52.
where full amount has not been paid before notice, 52.
what constitutes notice, 53-55.
holds instrument free from equities, 55-57.
may recover full face value, 55.
rights of person claiming under holder in due course, 57-59.
when burden on holder to prove that he took instrument in due course, 59-60.
HOLDER OF OFFICE, instrument payable to order of, 19.
HOLIDAY, when day for doing act falls on, 7.
instrument falling due on, 84.

INCOMPLETE INSTRUMENT, filling blanks, 22, 23.
not delivered, 24.
acceptance of, 120, 121.
INDORSER, where character not clear signer is presumed to be an indorser, 26, 27.
when person deemed such, 63.
irregular indorser, 63-65.
admits capacity of firm to make note, 67.
admits capacity of corporation to make note, 67.
parol evidence to vary liability of, 69.
liability of where paper negotiable by delivery, 69, 70.
presentment necessary in order to charge, 72, 141.
order in which indorsers liable, 70.
when presentment for payment not necessary to charge, 80.
right of recourse to, 83.
not a mere surety after dishonor, 83.
liability where collaterals have been received, 83.
holder not required to proceed on collaterals in order to charge indorsers, 83.
notice of dishonor must be given to, 87.
when notice of dishonor need not be given to, 104.
what will discharge, 107-110.
payment by does not discharge maker, 110, 111.
where released by failure to present bill for acceptance, 124.
liability of where bill dishonored by non-acceptance, 126.

INDORSER—*Continued.*
in what cases protest necessary in order to charge, 127, 128.
liability of where he indorses different parts of a set, 138.
of check discharged by delay to present, 141, 142.
INDORSEMENT, meaning of term, 6.
instrument indorsed in blank payable to bearer, 20.
by infant, 30.
by corporation, 30.
where written, 39.
required for negotiation of instrument payable to order, 39.
must be completed by delivery, 39, 40.
must be on instrument, 40.
or on an allonge, 40.
signature alone sufficient, 40, 41.
must be of entire instrument, 41.
kinds of, 41.
special indorsement, 41.
indorsement in blank, 41.
how special indorsement converted to blank indorsement, 41.
when restrictive, 42.
restrictive indorsement prohibiting further negotiation, 42.
restrictive indorsement constituting indorsee mere agent, 42.
restrictive indorsement vesting title in trust, 42.
effect of indorsement "for collection," 42.
restrictive indorsement authorizes indorsee to receive payment, 43.
restrictive indorsement authorizes indorsee to bring action, 43.
restrictive indorsement authorizes indorsee to transfer his rights as indorsee, 43.
effect of qualified indorsement, 43, 44.
qualified indorsement does not impair negotiable character of the instrument, 44.
qualified indorsement does not throw suspicion on paper, 44.
of instrument payable to bearer, 45.

INDORSEMENT—*Continued.*
where instrument payable to two or more, 45.
by cashier, 46.
by fiscal officer, 46.
where name misspelled, 46.
where payee or indorsee wrongly designated, 46.
in representative capacity, 46.
presumption as to place of, 47.
presumption as to time of, 47.
striking out indorsement, 48.
effect of striking out indorsement, 48.
when may be done, 48.
transfer without indorsement, 48, 49.
rights of transferee, 48, 49.
prior equities, 49.
warranty where negotiation by qualified indorsement, 65-68.
warranty of title in case of qualified indorsement, 65-68.
INFANT, indorsement by, 30.
INLAND BILL, what is, 213.
INSOLVENCY, no implied warranty that principal debtor not insolvent, 67.
does not excuse presentment, 82.
INSTALLMENTS, instruments payable in, 10.
INSTRUMENT, meaning of term, 146.
INTEREST, where instrument does not specify date from which interest to run, 25, 26.
does not make sum uncertain, 10.
ISSUE, meaning of term, 146.

JOINT DEBTORS, presentment to, 80.
JOINT PARTIES, two or more persons signing "I promise to pay," 26.
JUDGMENT NOTES, 14, 15.

LAW MERCHANT, when governs, 147.
LIABILITY, no one liable whose signature not on instrument, 27.
of person signing as agent, 27.
of maker, 61.
of drawer, 61.
of acceptor, 61-63.
of irregular indorser, 63-65.

LIABILITY—*Continued.*
of general indorser, 68, 69.
of indorser where paper negotiable by delivery, 65-69.
order in which indorsers liable, 70.
of agent or broker, 71.
LIEN, person having is holder for value, 34.
LUNATIC, acceptor cannot show drawer a lunatic, 63.

MAIL, miscarriage in, does not invalidate notice of dishonor, 96.
MAKER, note payable after death of, 14.
instrument payable to order of, 18, 19, 140.
liability of 61.
admission of, 61.
demand of payment not necessary to charge, 72.
liability to holder where part payment made by indorser, 106, 107.

MARRIED WOMAN, acceptor admits capacity of to draw bill, 62.
MATURITY, option to pay before, 13, 14.
time of, 84.
NEGOTIABLE INSTRUMENTS, law is confined to, 145.
"instrument" means negotiable instrument, 146.
must contain unconditional promise, 9.
must be for payment of sum certain, 9.
must be for payment of money only, 9.
must be in writing, 9.
must be signed by maker or drawer, 9.
must be payable on demand or at determinable future time, 9.
must be payable to order or bearer, 9.
statement of transaction does not affect negotiable character, 12, 13.
indication of particular fund does not render non-negotiable, 12.
order to pay out of particular fund not negotiable, 12, 13.
instrument payable on contingency not negotiable, 13.
provision for sale of collateral, 14, 15.
provision for confession of judgment, 14, 15.
waiver of benefits of law, 14, 15.
option to require something in lieu of payment in money, 14, 15.

NEGOTIABLE INSTRUMENTS—*Continued.*
instrument payable when certain person shall become of age, 14.
omissions not affecting, 15-17.
not dated, 16.
not specifying value given, 16.
not specifying place where drawn, 16.
not specifying place where payable, 16.
bearing seal, 16.
provisions as to collaterals, 14, 15.
designation of particular kind of current money, 16, 17.
instrument continues negotiable until discharged or restrictively indorsed, 47, 48.
NEGOTIABLE INSTRUMENTS LAW, short title, 145.
when to take effect, 147.
to what instruments it applies, 145.
NEGOTIATION of post-dated instruments, 21.
rules governing, 138.
what constitutes negotiation, 39.
of instrument payable to bearer, 39.
of instrument payable to order, 39.
by prior party, 49.
party secondarily liable paying instrument may again negotiate it, 110, 111.
when drawer and indorsers released by failure of holder to negotiate bill, 124.
bill must be negotiated within reasonable time, 73, 124.
of bills in sets, 137.
NEW YORK STATE BILLS, note payable in, 17.
NOTARY PUBLIC, may make protest, 130.
not disqualified because officer of bank, 130.
presentment must be by notary in person, 130.
certificate of as evidence, 128-130.
NOTE, meaning of term, 146.
NOTICE OF DISHONOR, where instrument issued or negotiated when overdue, 18.
indorser entitled to though he holds collateral, 73.
to whom must be given, 87, 88.
rules governing, 87-105.
must be given to indorser, 87.
must be given to drawer, 87.
need not be given to guarantor, 88.

NOTICE OF DISHONOR—*Continued.*
by whom may be given, 88.
notice by stranger not sufficient, 88.
party discharged cannot give, 88.
drawee who refuses acceptance cannot give, 88.
notice by agent, 88, 89.
bank as agent may give, 89.
to whose benefit notice enures, 89.
holder required to give notice only to his immediate indorser, 89.
when misdescription does not vitiate, 90.
when notice sufficient, 90.
notice need not be signed, 90.
omission of date and time of payment, 90.
printed notice, 91.
signature of notary, 91.
form of notice, 90.
when notice defective, 90, 91.
may be delivered personally, 90.
may be sent by mail, 90.
when sufficiency of notice question of law, 91.
may be given to agent, 92.
who deemed agent to receive, 92.
where party dead, 92.
to partners, 93.
to joint parties not partners, 93.
to bankrupt, 94.
to assignor for creditors, 94.
may be given as soon as instrument dishonored, 94.
where parties reside in same place, 94.
where parties reside in different places, 95, 96.
when notice deemed deposited in post-office, 96, 97.
miscarriage in mails does not impair validity of notice, 96.
time in which indorser to give notice to prior parties, 97.
where notice to be sent, 98.
when party adds address to signature, 98.
where party has not given address, 98.
where he lives in one place and has office in another, 98.
where he is sojourning in another place, 98.
when notice actually received this is sufficient, 98, 99.
waiver of, 99.
waiver of before dishonor, 99, 100.

NOTICE OF DISHONOR—*Continued.*
waiver of after dishonor, 99, 100.
what will constitute waiver, 99, 100.
waiver embodied in instrument, 100.
waiver written over signature, 100.
waiver of protest, what it includes, 101.
when notice dispensed with, 101.
when cannot be given after reasonable diligence, 101, 102.
what will constitute reasonable diligence, 101, 102.
when delay excused, 102, 103.
reliance upon directory, 102.
when notice need not be given to drawer, 103.
when notice need not be given to indorser, 104.
when instrument has been previously dishonored by non-acceptance, 104.
effect of omission to give notice of dishonor by non-acceptance, 104, 105.
NOTICE OF EQUITIES, what constitutes, 53-55.
See "PROMISSORY NOTE."
NOTICE, where transferee receives notice before payment in full for instrument, 52.
NOTING, 130, 131.

OMISSIONS, what omissions do not affect validity or negotiable character of instrument, 15, 16.
OPTION, to pay before maturity, 13, 14.
of holder to require something in lieu of payment in money, 14, 15.
ORDER, instrument must be payable to, or bearer, 9, 18, 19.
instruments payable to, 9, 18, 19.
instrument payable to order of drawer, 18.
maker, 18.
drawee, 18.
two or more payees, 19.
one of several payees, 19.
instrument payable to order of holder of office, 19.
payee must be named or indicated, 19.
OVERDUE INSTRUMENT is as regards parties issuing or negotiating payable on demand, 17.

PARTNERS, indorser of firm note admits capacity of firm to execute, 67.

PARTNERS—*Continued.*
presentment to, 137.
PATENT RIGHTS, negotiable instruments given for, 17.
PAYEES, two or more, 19.
one of several, 19.
when name not the name of any person, 19.
trade or assumed name, 61.
fictitious, 61.
acceptance admits existence of, 62.
acceptance admits capacity to indorse, 62.
acceptance does not admit signature of, 62.
PAYMENT, instrument must be for payment in money, 9.
instrument payable in merchandise, 9.
option to require something in lieu of payment in money, 13, 14.
holder in due course can recover face value, 55.
what constitutes payment in due course, 85, 86.
by principal debtor, 106.
by party accommodated, 106.
by party secondarily liable, 107.
what bills must be protested for non-payment, 127, 128.
bill protested for non-acceptance may be protested for non-payment, 131.
of bills in a set, 138.
PAYMENT FOR HONOR, who may make, 135.
how made, 135, 136.
preference of parties offering to pay for honor, 136.
effect on subsequent parties, 136.
where holder refuses to receive payment, 136.
effect of, 136.
declaration before payment, 136.
rights of payer for honor, 137.
PENCIL, writing may be in, 9.
PERSON, meaning of term, 6.
PERSON PRIMARILY LIABLE, who is, 146.
demand of payment not necessary to charge, 72.
PERSON SECONDARILY LIABLE, who is, 146.
right of recourse to, 83.
PLACE, failure to specify place where drawn does not affect negotiable character, 14.
presumption as to place of indorsement, 47.

PLACE—*Continued.*
of presentment, what is proper place, 132, 133.
alteration as to place, 113, 114.
POST-DATED INSTRUMENT, negotiation of, 21.
instrument not invalid because post-dated, 21.
POST-OFFICE, what constitutes deposit in, 97.
deposit in post-office box, 97.
PRE-EXISTING DEBT constitutes value, 32-34.
PRESENTATION, instrument payable on is payable on demand, 17.
PRESENTMENT FOR ACCEPTANCE, in what cases necessary, 123.
where bill payable after sight, 123.
where required to fix maturity, 123.
not necessary where payable at day certain or at fixed time after date, 123.
where bill expressly stipulates for, 123.
where bill not payable at drawee's place of business or residence, 123.
when drawer and indorsers released, 124.
duty of agent to present bill for acceptance, 123, 124.
how presentment made, 124.
must be by or on behalf of holder, 124.
must be at reasonable hour, 124.
on business day, 124.
before bill is overdue, 124.
must be to drawee or some person authorized to act for him, 124.
where there are two or more payees not partners, 124.
where drawee is dead, 125.
where drawee is bankrupt or insolvent, 125.
on what days may be made, 125.
where time insufficient, 126.
when excused, 126.
excused where drawee dead, 126.
excused where drawee has absconded, 126.
excused where drawee is fictitious person, 126.
excused where drawee has not capacity to contract, 126.
excused when cannot be made after reasonable diligence, 126.
PRESENTMENT FOR PAYMENT, of instrument issued or negotiated when overdue, 18.

PRESENTMENT FOR PAYMENT—*Continued.*
by what laws determined, 72.
necessary in order to charge drawer or indorsers, 72.
not necessary to charge party primarily liable, 72.
where instrument payable on demand, 73-75.
what constitutes sufficient presentment, 75, 76.
must be made on day of maturity, 73.
holder has entire day in which to make, 73.
what sufficient evidence of authority to receive payment, 75.
place of presentment, 76, 77.
where principal debtor dead, 79.
where maker or acceptor has abandoned place of business, 76.
where instrument payable at bank, 78.
collaterals must be tendered with instrument, 78.
instrument must be exhibited, 77, 78.
what will excuse exhibition, 78.
where persons primarily liable are partners, 79.
to joint parties who are not partners, 80.
when not required to charge indorser, 80.
when not required to charge drawer, 80.
when delay excused, 80, 81.
waiver of, 81-83.
what will amount to waiver, 81-83.
where drawee is fictitious person, 81.
when dispensed with, 81-83.
computation of time, 84, 85.
instrument falling due on Sunday, 84.
on holiday, 84.
on Saturday, 84.
not necessary where bill has been dishonored by non-acceptance, 127.
how made to acceptor for honor, 134.
within what time check must be presented, 141, 142.
effect of delay, 141, 142.
PRINCIPAL not liable unless his signature appears on instrument, 27.
PRINTED PROVISIONS, written provisions prevail over, 25.
"PROCURATION," signature by, 29, 30.
PROMISSORY NOTE, term "note" means, 146.
note given for purchase price of goods, 13.

PROMISSORY NOTE—*Continued.*
payable on or after death of maker, 14.
payable in gold coin, 17.
in bank bills, 17.
in New York State bills, 17.
in Florida funds, 17.
in specie, 17.
given for patent right, 17.
"Bohemian oats" notes, 17.
ambiguous instrument may be considered bill or note, 26.
when bill may be treated as, 116.
drawn to maker's own order, 140.
defined, 140.
non-negotiable notes, 32.
PROTEST, what waiver of includes, 101.
construction of term, 101.
construction of term in pleading, 101.
may be made in case of dishonor of any instrument, 105.
not required except in case of foreign bills, 105.
necessary in case of foreign bills, 127.
unnecessary unless bill appears on its face to be a foreign bill, 127.
how made, 128-130.
must be annexed to bill, 128.
must be under hand of notary, 128.
must be under seal of notary, 128.
when to be made, 130.
must specify time and place of presentment, 128.
must specify fact that presentment was made, 128.
cause for protesting the bill, 128.
demand made and answer given, 128.
manner of presentment, 128.
may be made by notary public, 130.
may be made by resident, 130.
presentment must be by notary himself, 130.
where made, 131.
when dispensed with, 131.
for better security, 131.
both for non-acceptance and non-payment, 131.
extending protest, 130, 131.
before maturity where acceptor insolvent, 131.
where bill is lost, 132.

PROTEST—*Continued.*
of bill accepted for honor, 135.

REASONABLE DILIGENCE, what will constitute in case of notice of dishonor, 101, 102.
See DUE DILIGENCE.
REASONABLE HOUR, what is, 75, 76.
REASONABLE TIME, what constitutes, 75, 76, 146.
when question of law, 146, 147.
when question of fact, 146, 147.
in case of instrument payable on demand, 52.
instrument payable on demand must be presented within, 73-75.
REFEREE IN CASE OF NEED, 215
RENUNCIATION, effect of, 112.
how made, 112.
REPEAL, laws repealed, 147.
REPRESENTATIVE CAPACITY, person indorsing in may negative personal liability, 46, 47.

SATURDAY, instrument falling due on, 84.
SEAL does not affect negotiable character, 16, 17.
of corporation, 17.
SHORT TITLE of negotiable instruments law, 145.
SIGHT, instrument payable at sight is payable on demand, 17.
SIGNATURE, no person liable whose signature does not appear on the instrument, 27.
by agent, 28.
by "procuration," 29.
forged signature, 30.
acceptance admits genuineness of drawer's signature, 61, 62.
SPECIE, note payable in, 17.
STRIKING OUT INDORSEMENT, effect of, 78.
when may be done, 78.
SUM CERTAIN, what is, 10.
SUNDAY, when day for doing act falls on, 147.
instrument falling due on, 84.
"SUNDRIES," instrument payable to, 20.

TENDER, ability and willingness at place of payment equal to, 72.
TERMS, when sufficient, 21.

TIME, how computed, 147.
when statute to take effect, 147.
of indorsement, 47.
TITLE, short title of act, 145.
burden of proof where title of prior party defective, 59.
when defective, 53.
warranty of where negotiation by delivery, 65-68.
warranty of where negotiation by qualified indorsement, 65-68.
warranty of by general indorser, 68-69.
TRADE NAME, persons signing in, 27.

UNCONDITIONAL PROMISE OR ORDER, what is, 12, 13.
order to pay out of particular fund is not, 12, 13.
USAGE, regard to be had to in determining question of reasonable time, 147.
USURY, no implied warranty that note is not void for usury, 67.

VALUE, meaning of term, 6.
failure to specify does not affect negotiable character of instrument, 16.
what constitutes, 32.
pre-existing debt in, 32-34.
what constitutes holder for value, 34.
lien on instrument constitutes, 34.

WAIVER of benefits of law by obligor, 14, 15.
of presentment for payment, 81-83.
what will amount to waiver of present for payment, 82, 83.
of notice of dishonor, 99, 100.
when embodied in instrument, 100, 101.
when written above signature, 100, 101.
of protest, what it includes, 101.
WARRANTY, where negotiation by delivery, 65-68.
where negotiation by qualified indorsement, 65-68.
of genuineness, 66, 67, 68, 69.
when warranty of genuineness not implied, 66.
of capacity, of prior parties where negotiation by delivery or qualified indorsement, 66, 67.
no implied warranty that note is not void for usury, 67.
no implied warranty that bill is not accommodation paper, 67.

WARRANTY—*Continued.*
on sale of municipal bonds, 66, 67, 68.
no implied warranty of capacity to contract on sale of municipal bonds, 66, 67, 68.
no implied warranty that principal debtor is not insolvent, 67.
general indorser warrants, that instrument is genuine, 68.
that instrument is what it purports to be, 68.
that he has a good title, 68.
that prior parties had capacity to contract, 68.
that instrument is valid and subsisting, 68.
in case of instrument indorsed "for collection" 68, 69.
"WITHOUT RECOURSE," effect of term, 43, 44.
WRITING may be in pencil, 9.
WRITTEN, what included in term, 146.
WRITTEN PROVISIONS prevail over printed, 26.

TABLE OF CASES.

PAGE.

Adair *v.* Lenox, 15 Ore. 489....48, 58, 86
Adams *v.* Wright, 14 Wis. 408....95, 129
Ætna National Bank *v.* Charter Oak Life Ins. Co. 50 Conn....37, 167
v. Fourth National Bank, 46 N. Y. 82.... 85
Aiken *v.* Marine Bank, 16 Wis. 679.... 90
Albertson *v.* Laughlin, 173 Pa. St. 525.... 14
Albrecht *v.* Atrimpler, 7 Pa. St. 476.... 35
Alger *v.* Scott, 54 N. Y. 14.... 115
Allen *v.* Rightmere, 20 Johns. 365.... 88
v. Suydam, 17 Wend. 368.... 124
American Bank *v.* Jenness, 2 Metc. 288.... 52
Exchange National Bank *v.* New York Belting etc., Co., 148 N. Y. 698....54, 55
National Bank *v.* Junk Bros., 94 Tenn. 634.... 94
Ames *v.* Meriam, 98 Mass. 294.... 141
Androscoggin Bank *v.* Kimball, 10 Cush. 373.... 23
Angle *v.* Insurance Co., 92 U. S. 330.... 114
Annville National Bank *v.* Kettering, 106 Pa. St. 531....100, 101
Armour *v.* McMichael, 36 N. J. Law, 92.... 33
Armstrong *v.* American Exchange National Bank, 133 U. S. 433. 116
v. Bank, 46 Ohio St. 412.... 20
v. National Bank of Boyertown, 90 Ky. 431.... 42
v. Thurston, 11 Md. 148.... 82
Arnold *v.* Dresser, 8 Allen, 435.... 80
v. Rock River Valley Union R. R. Co., 5 Duer, 207.... 15
Artisans' Bank *v.* Backus, 36 N. Y. 106.... 90
Attorney-General *v.* Continental Life Insurance Co., 71 N. Y. 325. 144
Ayer *v.* Hutchins, 4 Mass. 370....51, 59
Aymar *v.* Beers, 7 Cow. 705.... 147

Bachelor *v.* Priest, 12 Pick. 399.... 124
Backus *v.* Danforth, 10 Conn. 297.... 9
Bacon *v.* Burnham, 37 N. Y. 614.... 65
v. Hanna, 137 N. Y. 379.... 102
v. Page, 1 Conn. 405.... 18
Baer *v.* Leppert, 12 Hun, 516.... 102
Bailey *v.* Southwestern R. R. Bank, 11 Fla. 266....103, 115

Bank *v.* Carter, 88 Tenn. 279..... 143
v. Dibbrell, 91 Tenn. 301.....90, 99
v. Looney, 99 Tenn. 278.....29, 60
v. Millard, 10 Wall. 152..... 144
v. Patton, 109 Ill. 479..... 144
v. Price, 52 Iowa, 530..... 18
v. Schuler, 120 U. S. 511..... 144
v. Simpson, 90 N. C. 469..... 110
of Alexandria *v.* Swann, 9 Peters, 33.....90, 94
America *v.* Senior, 11 R. I. 376..... 48
British North America *v.* Ellis, 6 Sawyer, 98..... 47
Columbia *v.* Lawrence, 1 Peters, 578.....91, 92, 96, 98
Cooperstown *v.* Woods, 28 N. Y. 545.....91, 128
28 N. Y. 561..... 91
England *v.* Vagliano (1891), App. Cas. 107..... 20
Genessee *v.* Patchin Bank, 13 N. Y. 309.....37, 46
Jamaica v. Jefferson, 92 Tenn. 537.....64, 70
Metropolis *v.* First National Bank of Jersey City, 19 Fed. Rep. 658..... 42
Michigan *v.* Ely, 17 Wend. 508..... 119
Montgomery County *v.* Walker, 9 S. & R. 229..... 36
Ohio Valley *v.* Lockwood, 13 W. Va. 392..... 114
Port Jefferson *v.* Darling, 91 Hun, 236.....93, 101
Rome *v.* Village of Rome, 19 N. Y. 20..... 16
St. Albans *v.* Farmers' and Mechanics' Bank, 10 Vt. 141. 62
Syracuse *v.* Hollister, 17 N. Y. 46..... 78
the State *v.* Muskingum Bank, 29 N. Y. 619..... 46
United States *v.* Bank of Georgia, 10 Wheat. 333..... 62
v. Beirne, 1 Gratt. 234..... 70
v. Carneal, 2 Peters, 543.....91, 98
Utica *v.* Ives, 17 Wend. 501..... 109
v. Smith, 18 Johns. 230..... 78
Barclay *v.* Bailey, 2 Camp. 527..... 75
v. Weaver, 19 Pa. St. 396..... 83
Baring *v.* Clark, 19 Pick. 220.....106, 133
Barker *v.* Parker, 6 Pick. 80..... 83
Barney *v.* Worthington, 37 N. Y. 112..... 119
Barry *v.* Crowley, 4 Gill, (Md.) 194..... 129
Bartlett *v.* Isbell, 31 Conn. 297.....69, 102
v. Robinson, 30 N. Y. 187..... 98
Bassonhorst *v.* Wilby, 45 Ohio St. 336.....18, 66, 82
Batchelder *v.* White, 80 Va. 103..... 114
Bateman *v.* Joseph, 2 Camp. 461..... 102
Baumgardner *v.* Reeves, 35 Pa. St. 250..... 76
Baxendale *v.* Bennett, L. R. 3 Q. B. Div. 525..... 24
Baxter *v.* Little, 6 Met. 7..... 58

Bay *v.* Church, 15 Conn. 129..... 104
Bealls *v.* Peck, 12 Barb. 245..... 93
Beard *v.* Dedolph, 29 Wis. 136..... 49
Beauregard *v.* Knowlton, 156 Mass. 395..... 80
Beckwith *v.* Angell, 6 Conn. 317..... 42
Bedford Bank *v.* Acoarn, 125 Ind. 582..... 85
Belden *v.* Hann, 61 Iowa, 42..... 42
v. Lamb, 17 Conn. 451..... 81
Bell *v.* Alexander, 21 Gratt. 1..... 142
v. Dagg, 60 N. Y. 528..... 66
v. Hagerstown Bank, 7 Gill, 216.....91, 95, 96
Belmont *v.* Hoge, 35 N. Y. 65..... 54
Bemis *v.* McKenzie, 13 Fla. 553..... 18
Benedict *v.* Schmieg, 13 Wash. 476..... 80
Benjamin *v.* Rogers, 126 N. Y. 60..... 38
Benn *v.* Kutzschan, 24 Ore. 28.....11, 69
Berg *v.* Abbott, 83 Pa. St. 177..... 79
Berkley *v.* Tinsley, 88 Va. 1001, 1004..... 37
Berkshire Bank *v.* Jones, 6 Mass. 524..... 83
Berry *v.* Robinson, 9 Johns. 121.....18, 48
Bicknall *v.* Waterman, 5 R. I. 43..... 67
Biegler *v.* Merchants' Loan and Trust Co., 62 Ill. App. 560..... 15
Bigge *v.* Piper, 86 Tenn. 589..... 16
Bigley's Admr. *v.* Cluff, 16 Gratt. 284..... 99
Bill *v.* Stewart, 156 Mass. 508..... 141
Birrell *v.* Dickerson, 64 Conn. 61..... 57
Bisbing *v.* Graham, 14 Pa. St. 4..... 44
Bishop *v.* Chase, 156 Mo. 158..... 40
v. Dexter, 2 Conn. 419..... 18
Black *v.* Rigmay, 131 Mass. 80..... 36
Blackman *v.* Lehman, 63 Ala. 547.....19, 40, 70
v. Nearing, 43 Conn. 60..... 78
Blaine *v.* Bourne, 11 R. I. 119..... 42
Blair *v.* Wilson, 28 Grat. 170..... 141
Blakeslee *v.* Hewett, 16 Wis. 341..... 75
Blenderman *v.* Price, 50 N. J. Law 296..... 104
Block *v.* Bell, 1 M. & R. 149..... 26
Board of Education *v.* Fonda, 77 N. Y. 350..... 109
Boehm *v.* Sterling, 7 T. R. 423, 430..... 51
Boetcher *v.* Colorado National Bank, 15 Col. 16..... 144
Bogarth *v.* Breedlove, 39 Tex. 561..... 114
Bonaud *v.* Genesi, 42 Ga. 639..... 33
Bond *v.* Farnham, 5 Mass. 170..... 83
v. Storrs, 13 Conn. 416..... 73
Born *v.* First National Bank, 123 Ind. 78..... 143
Boston Bank *v.* Hodges, 9 Pick. 420..... 70

Bowen *v.* Newell, 8 N. Y. 100; 13 N. Y. 390.....141
Boyd *v.* Bank of Toledo, 32 Ohio St. 526..... 82
v. McCann, 10 Md. 118.....23, 58
v. Orton, 16 Wis. 495..... 93
Boyd's Admr., *v.* City Savings Bank, 15 Gratt. 501.....91, 92, 93
Brackett *v.* Mountford, 11 Me. 115..... 114
Bradshaw *v.* Van Valkenberg, 97 Tenn. 316..... 56
Brailsford *v.* Williams, 15 Md. 151..... 88
Brainerd *v.* N. Y. H. R. R. Co., 25 N. Y. 496..... 16
Bramhall *v.* Atlantic National Bank, 36 N. J. Law, 243..... 57
Brandt *v.* Mickle, 26 Md. 436..... 83
Bray *v.* Hadwen, 5 Maule & Sel. 68..... 97
Breckhill *v.* Randall, 102 Ind. 528..... 145
Breed *v.* Hillhouse, 7 Conn. 523..... 88
Breneman *v.* Furniss, 90 Pa. St. 186.....35, 70
Brewster *v.* Arnold, 1 Wis. 264.....90, 91, 101
v. McCardle, 8 Wend. 78..... 21
v. Schrader, 26 Misc. (N. Y.) 480..... 32
Bridgeport City Bank *v.* The Empire Stone Dressing Co. 30 Barb. 421..... 37
Bridgeport City Bank *v.* Welsh, 29 Conn. 475..... 33
Briggs *v.* Partridge, 64 N. Y. 363..... 27
Brill *v.* Tuttle, 81 N. Y. 454.....115, 116
Bristol *v.* Warner, 19 Conn. 74.....14, 16, 140
Brockway *v.* Allen, 17 Wend. 40..... 122
Brooks *v.* Sullivan (N. C.), 39 S. E. Rep. 822..... 33
Brown *v.* Ambler, 66 Md. 391..... 120
v. Bank of Abington, 85 Va. 95..... 91
v. Butchers' and Drovers' Bank, 6 Hill, 443.....21, 28
v. Curtiss, 2 B. Y. 225..... 88
v. Davis, 3 T. R. 80..... 51
v. Hull, 33 Gratt. 23.....18, 47, 48
v. Moffey, 15 East, 222.....83, 100
v. Philadelphia Bank, 6 S. & R. 484..... 129
Brownell *v.* Winnie, 29 N. Y. 400..... 114
Bryant *v.* Eastman, 7 Cush. 111..... 46
v. La Banque du Peuple (1893), App. Cas. 170..... 30
v. Merchants' Bank, 8 Bush. 43..... 100
v. Taylor, 19 Minn. 396..... 101
Buchanan *v.* Wren, 30 S. W. Rep. 1077..... 13
Buck *v.* Freehold Bank, 37 N. J. Law, 307..... 83
Buckley *v.* Second National Bank of Jersey City, 35 N. J. Law, 400..... 30
Buckner *v.* Finley, 2 Peters, 586..... 116
Bull *v.* Bank of Kasson, 123 U. S. 105..... 141
Burgess *v.* Vreeland, 4 Zab. 71..... 96

Burroughs *v.* Moss, 10 Barn. & Cress. 558..... 58
Burson *v.* Huntington, 21 Mich. 416..... 25
Bush *v.* Gilmore, 45 App. Div. (N. Y.) 89..... 72

Cabot Bank *v.* Morton, 4 Gray, 156..... 71
v. Warner, 92 Mass. 522..... 88
Cady *v.* Bradshaw, 116 N. Y. 188..... 82
Callahan *v.* Kentucky Bank, 82 Ky. 231..... 94
Campbell *v.* French, 6 T. R. 200..... 104
Canajoharie National Bank *v.* Diefendorf, 123 N. Y. 191..... 54, 59
Canal Bank *v.* Bank of Albany, 1 Hill, 287..... 66
Carnwright *v.* Gray, 127 N. Y. 92.....14, 19, 140
Carpenter *v.* Nat. Bank of the Republic, 106 Pa. St. 170..... 36
Carr *v.* Seperr, 27 Pa. St. 413..... 9
Carroll *v.* Swift, 128 N. Y. 19..... 142
Carter *v.* Burley, 9 N. H. 558, 566..... 120
v. Wolf, 1 Heisk, 674..... 20
Cary *v.* White, 52 N. Y. 138.....33, 109
Casco National Bank *v.* Clark, 139 N. Y. 307..... 29
Cayuga County Bank *v.* Bennett, 5 Hill, 236..... 93
v. Hunt, 2 Hill, 635.....79, 95, 125
v. Worden, 1 N. Y. 413..... 90
v. Worden, 6 N. Y. 19.....90, 91
Cecil Bank *v.* Farmers' Bank, 22 Md. 148..... 42
Central Bank *v.* The Empire Stone Dressing Co., 26 Bart. 23..... 37
National Bank *v.* Dreydoppel, 134 Pa. St. 499..... 65
R. R. Co. *v.* The First National Bank of Lynchburg, 73 Ga. 384..... 42
Champion *v.* Gordon, 70 Pa. St. 474..... 141
Chandler *v.* Drew, 6 N. H. 469..... 58
Chanoine *v.* Fowler, 3 Wend. 173..... 88
Chapman *v.* Keene, 3 Adol. & Ellis, 193..... 88
v. White, 6 N. Y. 412..... 141
Charles *v.* Dennis, 42 Wis. 56..... 60
Chase National Bank *v.* Faurot, 149 N. Y. 532..... 16
Cheever *v.* Pittsburgh, Shenango & Lake Erie R. R. Co., 150 N. Y. 59..... 54
Chicago, etc., R. R. Co. *v.* West, 37 Ind. 211..... 103
Chicopee Bank *v.* Chapin, 8 Metc. 40..... 57
Chipman *v.* Tucker, 38 Wis. 290..... 25
Chisholm *v.* First National Bank of New York, 39 S. W. Rep. 340 20
Chouteau *v.* Webster, 6 Metc. 1..... 90
Christian *v.* Keene, 80 Va. 369..... 63
Chrysler *v.* Griswold, 43 N. Y. 209..... 17
Church *v.* Clark, 21 Pick. 309..... 78
v. Howard, 17 Hun, 5..... 114

Cincinnati H. & D. R. R. Co. *v.* Metropolitan National Bank, 54 Ohio St. 60..... 144
Cincinnati Oyster & Fish Co. *v.* National Lafayette Bank, 51 Ohio St. 106..... 143
Citizens' Bank *v.* Lay, 80 Va. 436.....78, 111
National Bank *v.* Richmond, 121 Mass. 110..... 113
v. Williams, 174 Pa. St. 66..... 112
City Bank of Sherman *v.* Weiss, 68 Tex. 332..... 42
Clapp *v.* Rice, 13 Gray, 403..... 70
Clark *v.* Sigourney, 17 Conn. 520..... 40
v. Seabright, 135 Pa. St. 173..... 77
Cline *v.* Miller, 8 Md. 274.....36, 122
Clutton *v.* Attenborough (1895), 2 Q. B. 707..... 20
Coddington *v.* Bay, 20 Johns. 637.....32, 33
v. Davis, 1 N. Y. 186..... 101
Cogswell *v.* Hayden, 5 Ore. 22..... 65
Cole *v.* Cushing, 8 Pick. 48..... 108
Coleman *v.* Carpenter, 9 Pa. St. 178..... 94
Colt *v.* Noble, 5 Mass. 167.....89, 97
Comer *v.* Dufour, 95 Ga. 376..... 142
Commercial Bank of Kentucky *v.* Varnum, 49 N. Y. 269...116, 128, 130
National Bank *v.* Armstrong, 148 U. S. 50..... 42
v. Hamilton National Bank, 42 Fed. Rep. 880..... 42
v. Henninger, 105 Pa. St. 496..... 85
v. Hughes, 17 Wend. 94..... 85
Commonwealth *v.* Am. Life. Ins. Co., 167 Pa. St. 586..... 115
Comstock *v.* Hier, 73 N. Y. 269..... 33
Conant *v.* Johnston, 165 Mass. 450..... 59
Condon *v.* Pearce, 43 Md. 83..... 66
Connors *v.* Taylor, 13 Wis. 224..... 64
Conover *v.* Stillwell, 34 N. J. Law, 54..... 32
Continental Life Insurance Co. *v.* Baxter, 50 Conn. 567..... 101
National Bank *v.* Bell, 125 N. Y. 38..... 34
v. Townsend, 87 N. Y. 8..... 51
v. Tradesmen's National Bank, 36 App. Div. 112..... 62
Cook *v.* Foraker, 193 Pa. St. 461..... 96
v. Litchfield, 9 N. Y. 279..... 91
v. Warren, 88 N. Y. 37..... 101
Cooke *v.* State National Bank, 52 N. Y. 96..... 143
Coolidge *v.* Brigham, 5 Metc. 68..... 66
v. Ruggles, 15 Mass. 387..... 14
Corbett *v.* Fetzer, 47 Neb. 269..... 44
Corlies *v.* Hoose, 11 Gray, 125..... 35
Corn Exchange Bank *v.* American Dock & Trust Co., 149 N. Y. 174..... 9

Coruth *v.* Walker, 8 Wis. 252..... 129
Costello *v.* Crowell, 127 Mass. 293..... 15
Coster *v.* Thomason, 19 Ala. 717..... 93
Cottrell *v.* Watkins, 89 Va. 801.....37, 51, 111
Couch *v.* Waring, 9 Conn. 261..... 108
Coulter *v.* Richmond, 59 N. Y. 478..... 65
County of Beaver *v.* Armstrong, 44 Pa. St. 63..... 9
Cover *v.* Myers, 75 Md. 406.....58, 69
Covert *v.* Rhodes, 48 Ohio St. 66..... 144
Cowan *v.* Hallock, 9 Colo. 576..... 32
Cowing *v.* Altman, 71 N. Y. 441..... 21
Cowles *v.* Harts, 3 Conn. 522..... 44
v. Horton, 3 Conn. 523..... 91
v. Peck, 55 Conn. 251..... 83
Cowton *v.* Wickersham, 54 Pa. St. 302..... 62
Cox *v.* National Bank, 100 U. S. 713..... 73
Crawford *v.* Millspaugh, 13 Johns. 87..... 109
v. Roberts, 8 Ore. 324..... 107
v. West Side Bank, 100 N. Y. 50..... 114
Credit Company *v.* Howe Machine Co., 54 Conn. 357..... 54
Crim *v.* Starkweather, 88 N. Y. 339..... 74
Critchlow *v.* Parry, 2 Camp. 182..... 66
Croft's Appeal, 42 Conn. 154..... 54
Cromwell *v.* County of Sac, 96 U. S. 60..... 56
v. Hynson, 2 Camp. 596..... 76
Crosby *v.* Roub, 16 Wis. 616..... 40
Crout *v.* DeWolf, 1 R. I. 393..... 31
Crowley *v.* Barry, 4 Gill. 194..... 79
Cruger *v.* Armstrong, 3 Johns. 5..... 141
Culbertson *v.* Nelson, 93 Iowa, 187..... 10
Culver *v.* Reno Real Estate Company, 91 Pa. St. 367..... 37
Cumberland Bank *v.* Hann, 3 Harr. 222.....49, 58
Cummings *v.* Kohn, 12 Mo. App. 585..... 43
Cunningham *v.* Scott, 90 Hun, 410..... 54
Curran *v.* Miller, 68 Wis. 16..... 140
Curtis *v.* Hazen, 56 Conn. 146..... 9
Cuyler *v.* Stevens, 4 Wend. 566..... 91

Dalrymple *v.* Hillenbrand, 62 N. Y. 5..... 67
Dann *v.* Norris, 24 Conn. 337..... 39
Darbishire *v.* Parker, 6 East. 8..... 95
Dart *v.* Sherwood, 7 Wis. 533..... 27
Darwin *v.* Rippey, 63 N. C. 318..... 114
Daskman *v.* Ullman, 74 Wis. 174..... 67
Davis *v.* Garr, 6 N. Y. 124..... 19
v. Miller, 14 Gratt. 1.....51, 58, 111
v. Old Colony Railroad Company, 131 Mass. 258..... 37

Davis *v.* Wait, 12 Oregon, 425..... 36
Sewing Machine Co. *v.* Best, 105 N. Y. 59..... 24
Day v. Ridgway, 17 Pa. St. 303..... 69
Debedian *v.* Gala, 64 Md. 262..... 21
Deering *v.* Creighton, 19 Ore. 118..... 65
Delano *v.* Bartlett, 6 Cushing, 364..... 32
De la Torre *v.* Barclay, 1 Stark. 308..... 104
Delaware County Trust Co. *v.* Title Ins. Co., 199 Pa. St. 17..... 110
Denninger *v.* Miller, 7 App. Div. 409..... 93
Denniston *v.* Stewart, 17 How. (U. S.) 606..... 128
Deposit Bank of Georgetown *v.* Fayette National Bank, 90 Ky. 10 62
De Witt *v.* Walton, 9 N. Y. 574..... 28
Deyo *v.* Thompson, 53 App. Div. (N. Y.) 12..... 140
Dickens *v.* Beal, 10 Pet. 572..... 80
v. Hall, 87 Pa. St. 379..... 99
Dietrich *v.* Boylie, 23 La. Ann. 767..... 11
Dillenbeck *v.* Bygert, 97 N. Y. 303..... 111
Dingman *v.* Amsink, 77 Pa. St. 114..... 35
Dinsmore *v.* Duncan, 57 N. Y. 573..... 16
Dodd *v.* Denny, 6 Oregon, 156..... 18
v. Jette, 10 Oregon, 31..... 141
Dodson *v.* Taylor, 56 N. J. Law, 11.....91, 93
Dolph *v.* Rice, 18 Wis. 379..... 141
Donald *v.* Magruder, 3 Peters, 470..... 70
Donegan *v.* Wood, 49 Ala. 251..... 128
Dorsey *v.* Wolff, 142 Ill. 589..... 11
Doty *v.* Caldwell, 38 S. W. Rep. 1025..... 144
Doubleday *v.* Kress, 50 N. Y. 410..... 75
Dounes *v.* Church, 13 Peters, 205..... 138
Draper *v.* Clemens, 7 Mo. 52..... 78
Dresser *v.* Missouri, etc., R. R. Construction Co., 93 U. S. 95.....52, 53
Drew *v.* Towle, 7 Frost, 412..... 36
Drexler *v.* McGlynn, 99 Cal. 143..... 88
Drum *v.* Drum, 133 Mass. 566..... 113
Ducket *v.* Von Lillienthal, 11 Wis. 56..... 129
Duffield *v.* Johnston, 95 N. Y. 369..... 14
Dull *v.* Bricker, 76 Pa. St. 255..... 119
Durkin *v.* Cranston, 7 Johns. 442..... 137
Dykman *v.* Northbridge, 1 App. Div. 26.....78, 130

Easterly *v.* Barber, 66 N. Y. 433..... 70
Eaton *v.* Libbey, 165 Mass. 218..... 32
v. McMahon, 42 Wis. 484.....69, 81
Eckert *v.* Cameron, 7 Wright, 120..... 106
Edelen *v.* White, 6 Bush. 408..... 70
Edgerton *v.* Edgerton, 8 Conn. 6..... 16

Edis *v.* Bury, 6 Barn. & Cress. 433 27
Egbert *v.* Hanson, 34 Misc. 597 70
Eilbert *v.* Finkbeimer, 68 Pa. St. 243 65
Elford *v.* Teed, 1 Maule & Sel. 28 64
Ellicott *v.* Martin, 6 Md. 509 ..... 50, 59
Elliot *v.* Chestnut, 30 Md. 562 23
Ellis *v.* Ins. Co., 4 Ohio St. 628 62
Em *v.* Carroll, 1 Yerger, 144 29
Epler *v.* Funk, 8 Pa. St. 468 44
Emmerson *v.* Townsend, 73 Md. 224 55
Ernst *v.* Steckman, 74 Pa. St. 13 14
Espy *v.* Bank of Cincinnati, 18 Wall. 620 141
Etting *v.* Schuylkill Bank, 2 Pa. St. 355 ..... 91, 97
Ex parte Barclay, 7 Ves. 597 88
Moline, 19 Ves. 216 94

Falkill National Bank *v.* Sleight, 1 App. Div. 189 109
Fall River Union Bank *v.* Willard, 5 Metclf. 216 78
Fancourt *v.* Thorne, 9 Q. B. 312 15
Farmers' Bank *v.* Ewing, 78 Ky. 264 101
v. Sprigg, 11 Md. 390 108
etc., Bank *v.* Troy City Bank, 1 Dough. 457 46
and Mechanics' Bank *v.* Butchers' and Drovers' Bank, 16 N. Y. 125 ..... 37, 76, 143
and Mechanics' Bank *v.* Empire Stone Dressing Co., 5 Bosw. 275 37
Farnsworth *v.* Allen, 4 Gray, 453 ..... 75, 76
Fassin *v.* Hubbard, 55 N. Y. 465 ..... 44, 92
Fenn *v.* Harrison, 3 T. R. 757 67
Field *v.* Nickerson, 13 Mass. 131 52
Fifth Ward Savings Bank *v.* First National Bank, 48 N. J. Law, 513 54
Filon *v.* The Miller Brewing Co., 38 N. Y., St. Rep. 602 37
First National Bank *v.* Alton, 60 Conn. 402 14
v. Buckhannon Bank, 80 Ind. 475 142
v. Bynum, 84 N. C. 24 11
v. Clark, 61 Md. 400 119
v. Falkenham, 94 Cal. 141 101
v. Gay, 63 Mo. 38 11
v. Hall, 44 N. Y. 395 46
v. Harris, 7 Wash. 139 ..... 106, 111
v. Larsen, 60 Wis. 206 11
v. Leach, 52 N. Y. 350 143
v. Maxfield, 83 Me. 576 111
v. Northwestern National Bank, 152 Ill. 296 143
v. Peltz, 176 Pa. St. 513 109

First National Bank *v.* Ricker, 71 Ill. 439..... 62
v. Schreiner, 110 Pa. St. 188..... 101
v. Wallis, 150 N. Y. 455..... 29
v. Whitman, 94 U. S. 343..... 144
v. Wood, 71 N. Y. 405..... 83
of Champlain *v.* Wood, 128 N. Y. 35..... 58
Danvers *v.* First National Bank of Salem, 151 Mass. 280..... 62
Portland *v.* Linn County National Bank, 30 Oregon, 296..... 142
Union Mills *v.* Clark, 134 N. Y. 368..... 144
Wymore *v.* Miller, 43 Neb. 791..... 142
Firth *v.* Thrush, 8 Barn. & Cress, 387..... 92
Fisher *v.* Fisher, 98 Mass. 303.....33, 35
Fitchburg Bank *v.* Greenwood, 2 Allen 434..... 44
Fitzgerald *v.* Booker, 96 Mo. 661..... 33
Flagg *v.* School District, 4 N. D. 30..... 10
Flint *v.* Phipps, 16 Oregon, 437..... 32
Florence Mills Co. *v.* Brown, 124 U. S. 385..... 144
Foland *v.* Boyd, 23 Pa. St. 476..... 93
Folger *v.* Chase, 18 Pick. 63.....40, 46
Fonner *v.* Smith, 31 Neb. 107..... 144
Ford *v.* Mitchell, 15 Wis. 304..... 17
Foster *v.* McKinnon, L. R. 4 C. P. 704..... 56
Fourth National Bank *v.* Henschuh, 52 Mo. 207.....79, 93
Street National Bank *v.* Yardley, 165 U. S. 634..... 144
Fox *v.* Rural Home Co., 90 Hun, 365..... 38
Frampton *v.* Coulson, 1 Wils. 33..... 72
Frank *v.* Lillienfeld, 33 Gratt. 377.....23, 54
Franklin *v.* Twogood, Iowa. 515..... 40
Bank *v.* Lynch, 52 Md. 270..... 119
Frazer *v.* D'Quillier, 2 Pa. St. 200..... 9
Freeman *v.* Boynton, 7 Mass. 483..... 78
Freeman's Bank *v.* National Tube Works, 151 Mass. 413..... 42
Freese *v.* Brownell, 35 N. J. Law, 285..... 47
French *v.* Bank of Columbia, 4 Cranch, 141..... 104
v. Jarvis, 29 Conn. 347.....18, 48, 110
v. Turner, 15 Ind. 59..... 40
Fridenberg *v.* Robinson, 14 Fla. 130..... 109
Friend *v.* Wilkinson, 9 Gratt. 31..... 96
Fuller *v.* Green, 64 Wis. 159..... 114
Fulton *v.* MacCracken, 18 Md. 528..... 128
Fydell *v.* Clark, 1 Esp. 447..... 67

Garland *v.* Salem Bank, 9 Mass. 408..... 100
Garnett *v.* Woodcock, 1 Starkie, 475..... 78

Garvin *v.* Wiswell, 83 Ill. 218.....40, 70
Gates *v.* Beecher, 60 N. Y. 518.....76, 78, 80, 93
Gawtry *v.* Doane, 48 Barb. 148..... 100
Gaylord *v.* Van Soan, 15 Wend. 308..... 18
Gennis *v.* Weighley, 114 Pa. St. 194..... 108
Georgia National Bank *v.* Henderson, 46 Ga. 496..... 141
German-American Bank *v.* Niagara Cycle Co., 13 App. Div. 450..83, 109
National Bank *v.* Foreman, 138 Pa. St. 474..... 85
Germania National Bank *v.* Tooke, 101 N. Y. 442..... 119
Gettysburg National Bank *v.* Chisholm, 169 Pa. St. 564....112, 113, 114
Giffert *v.* West, 37 Wis. 115.....66, 67
Gifford *v.* Hardell, 88 Wis. 538..... 142
Gill *v.* Palmer, 29 Conn. 57..... 90
Gilmore *v.* Wilbur, 12 Pick. 124..... 147
Giovanovich *v.* Citizens' Bank, 26 La. Ann. 15..... 33
Glaser *v.* Rounds, 16 R. I. 235..... 100
Gleason *v.* Hamilton, 138 N. Y. 353..... 113
Glidden *v.* Chamberlin, 167 Mass. 486.....47, 67
Gloucester Bank *v.* Worcester, 10 Pick. 528..... 109
Good *v.* Martin, 95 U. S. 93..... 64
Goodner *v.* Maynard, 7 Allen, 456..... 111
Goodnow *v.* Warren, 122 Mass. 82..... 93
Goshen National Bank *v.* Bingham, 118 N. Y. 349..... 49
Gosling v. Griffin, 85 Tenn. 737..... 86
Goss *v.* Nelson, 1 Burr. 226..... 14
Gould *v.* Eager, 17 Mass. 615..... 111
Goupy *v.* Harden, 7 Taunt. 397..... 124
Gowan *v.* Jackson, 20 Johns. 176..... 124
Gowdey *v.* Robbins, 3 App. Div. 353..... 112
Grand Bank *v.* Blanchard, 23 Pick. 305..... 79
Grange *v.* Reigh, 93 Wis. 552-1130..... 142
Grant *v.* Fleming, 46 Pa. St. 140..... 44
v. Wood, 12 Gray, 220..... 14
Gray's Admr. *v.* Bank of Kentucky, 29 Pa. St. 365.....53, 59
Greenwich Bank *v.* De Groot, 7 Hun. 210..... 102
Gregg *v.* Beane, 69 Vt. 22, 248..... 142
Griffiths *v.* Kellogg, 39 Wis. 290..... 25
v. Shipley, 74 Md. 591..... 50
Grissom *v.* Commercial Bank, 87 Tenn. 350..... 85
Guarantee Co. *v.* Craig, 155 Pa. St. 343..... 109
Guild *v.* Goldsmith, 97 Fla. 212..... 74
Gunston *v.* Heat and Power Co., 181 Pa. St. 327..... 62

Hagerty *v.* Phillips, 83 Me. 336..... 70
Hagey *v.* Hill, 75 Pa. St. 108..... 110
Hague *v.* Davis, 8 Gratt. 4..... 70

Haines *v.* Dubois, 29 N. J. Law, 259..... 39
v. Merrill, 56 N. J. Law, 312..... 59
Hale *v.* Danforth, 46 Wis. 554.....70. 82
Halifax *v.* Lyle, 3 Welsby, H. & G. 446..... 62
Hall *v.* Auburn Turnpike Co., 27 Cal. 256..... 37
v. Toby, 110 Pa. St. 318.....18, 41
Halliday *v.* Hart, 30 N. Y. 474..... 109
v. McDougall, 20 Wend. 81.....128, 129
Hallowell *v.* Curry, 41 Pa. St. 322..... 79
Haly *v.* Brown, 5 Pa. St. 178.....97, 98, 192
Hanover National Bank *v.* American Dock & Trust Co., 148 N. Y. 612..... 9
Hansborough *v.* Gray, 3 Gratt. 340..... 72
Harger *v.* Wilson, 63 Barb. 237..... 57
Harker *v.* Anderson, 21 Wend. 373..... 141
Harmon *v.* Haggerty, 88 Tenn. 705..... 145
Harper *v.* Young, 112 Pa. St. 419..... 55
Harris *v.* Clark, 3 N. Y. 93.....115, 141
v. The Bank of Jacksonville, 20 Fla. 501..... 113
Harrison *v.* Ruscoe, 15 L. H. Exch. 110; 15 M. & W. 231..... 88
v. Nicollet National Bank, 41 Minn. 488..... 141
Harrold *v.* Kays, 64 Mich. 439..... 33
Hart *v.* Stickney, 41 Wis. 630..... 51
Hartford Bank *v.* Stedman, 3 Conn. 494..... 102
Hartley *v.* Carboy, 150 Pa. St. 23..... 113
Haskell *v.* Boardman, 8 Allen, 38..... 100
v. Brown, 65 Ill. 29..... 40
v. Jones, 86 Pa. St. 173..... 17
Hastings *v.* Thompson, 54 Minn. 184..... 10
Hawley *v.* Jette, 10 Oregon, 31..... 82
Hayes *v.* Werner, 45 Conn. 252..... 74
Haynes *v.* Birks, 3 Bor & Pul. 599..... 89
Heard *v.* Dubuque Bank, 8 Neb. 10..... 11
Hegeman *v.* Moon, 131 N. Y. 462..... 14
Heise *v.* Bumpass, 40 Ark. 547..... 26
Heist *v.* Hart, 73 Pa. St. 286..... 40
Henderson *v.* Thornton, 37 Miss. 448..... 63
Henry Christian Building and Loan Association *v.* Walton, 187 Pa. St. 201..... 31
Herdic *v.* Roessler, 109 N. Y. 127.....17, 35
Hereth *v.* Meyer, 33 Ind. 511..... 13
Herker *v.* Anderson, 21 Wend. 372..... 141
Herrick *v.* Whitney, 15 Johns. 240..... 66
v. Woolverton, 41 N. Y. 581..... 74
Heuertematte *v.* Morris, 101 N. Y. 63.....34, 63
Hewins *v.* Cargill, 67 Me. 554..... 114

Hibernia Bank *v.* Lacomb, 84 N. Y. 367 73
Higgins *v.* Ridgway, 153 N. Y. 130 40
Hill *v.* Farrell, 3 Greenleaf, 233 102
Hills *v.* Place, 48 N. Y. 520 ..... 72, 73
Hinckley *v.* Merchants' National Bank, 131 Mass. 147 60
Hinsdale *v.* Miles, 5 Conn. 331 132
Hobbs *v.* Straine, 149 Mass. 212 101
Hodges *v.* Shuler, 22 N. Y. 114 ..... 15, 90
Hoffman *v.* Planters' National Bank (Va.), 39 S. E. Rep. 134 114
Holbrook *v.* Burt, 22 Pick. 555 147
Holcomb *v.* Wyckoff, 35 N. J. Law, 38 57
Holdsworth *v.* Hunter, 10 C. & B. 449 138
Holmes *v.* Roe, 62 Mich. 199 142
v. West, 17 Cal. 623 18
Holtz *v.* Boppe, 37 N. Y. 634 76
Home Insurance Company *v.* Green, 19 N. Y. 518 91
National Bank *v.* Newton, 8 Bradwell, 563 85
Homer *v.* Wallis, 11 Mass. 310 114
Hook *v.* Pratt, 78 N. Y. 371 43
Hopkinson *v.* Foster, L. R. 18 Eq. 74 ..... 141, 144
House *v.* Vinton Bank, 43 Ohio St. 346 94
Howard *v.* Boorman, 17 Wis. 459 ..... 38, 72
v. Ives, 1 Hill, 263 97
Howe *v.* Merrill, 15 Cush. 88 70
Howland *v.* Adrian, 29 N. J. Law, 41 ..... 96, 97, 102
v. Carson, 15 Pa. St. 453 120
Hubbard *v.* Gurney, 64 N. Y. 450 109
v. Matthews, 54 N. Y. 43 93
Huff *v.* Wagner, 63 Barb. 230 57
Huffuker *v.* National Bank, 12 Bush. 293 129
Hughes *v.* Large, 2 Pa. St. 103 58
Humphreys *v.* Sutcliffe, 192 Pa. St. 336 78
Hungerford *v.* O'Brien, 37 Minn. 306 88
Hunter *v.* Hook, 64 Barb. 469 100
v. Van Bomhurst, 1 Md. 504 91
Hutchinson *v.* Boggs & Kirk, 28 Pa. St. 294 59
Hutchison *v.* Crutcher, 98 Tenn. 421 79

Industrial Bank of Chicago *v.* Bower, 165 Ill. 70 142
Trust Title and Savings Co. *v.* Weakley, 103 Ala. 458 142
Ingalls *v.* Lee, 9 Barb. 547 47
Ingersoll *v.* Martin, 58 Md. 67 35
In re Bishops' Estate, 195 Pa. St. 85 109
Brown, 2 Story 502 141
Hammond, 6 De G. M. & G. 699 67
Swift, 106 Fed. Rep. 65 104

Insurance Company *v.* Wilson, 29 W. Va. 543..... 73
Iron City National Bank *v.* Fort Pitt National Bank, 159 Pa. St. 46..... 62
Irving National Bank *v.* Alley, 79 N. Y. 536..... 140
Ivory *v.* Bank of the State, 36 Mo. 475..... 141

Jackson *v.* Meyers, 43 Md. 466..... 17
v. Richards, 2 Caines, 43..... 82
Jenkins *v.* Schnaub, 14 Wis. 1..... 34
James *v.* Brown, 11 Ohio, 601..... 18
Jameson *v.* Swinton, 2 Taunt. 224..... 97
Jarnigan *v.* Stratton, 95 Tenn. 619..... 93
Jarvis *v.* Manhattan Beach Co., 148 N. Y. 652..... 54
v. St. Croix Manufacturing Co., 23 Me. 287..... 96
v. Wilson, 46 Conn. 91..... 119
Jeffreys *v.* Rosenfeld (Mass.), 61 N. E. Rep. 49..... 112
Jenkins *v.* Schnaub, 14 Wis. 1..... 34
v. White, 147 Pa. St. 303..... 100
Jenkinson *v.* Wilkinson, 110 N. C. 532..... 49
Jennison *v.* Stafford, 1 Cush. 168..... 35
Johnson *v.* Brown, 154 Mass. 105.....97, 129
v. Clark, 39 N. Y. 216..... 119
v. Mitchell, 50 Tex. 212..... 45
v. Ramsay, 43 N. J. Law, 279..... 70
Jones *v.* Darch, 4 Price, 300..... 62
v. Home Furnishing Co., 9 App. Div. 103..... 61
v. Roberts, 191 Pa. St. 152..... 100
v. Rodetz, 27 Minn. 240..... 11
Jordan *v.* Grover, 99 Cal. 194..... 59
v. Tate, 19 Ohio St. 586..... 14
Joseph *v.* Solomon, 19 Fla. 623.....116, 128
Joy *v.* Diefendorf, 130 N. Y. 6..... 59
Joyce *v.* Realm Insurance Company, L. R. 7 Q. B. 580..... 26
Judah *v.* Harris, 19 Johns. 144..... 17

Kaschner *v.* Conklin, 40 Conn. 81..... 111
Keith *v.* Jones, 9 Johns. 120..... 17
Kelley *v.* Brown, 5 Gray, 108..... 100
v. Whitney, 45 Wis. 110..... 51
Kelly *v.* Burroughs, 102 N. Y. 93.....70, 111
Kenworthy *v.* Sawyer, 125 Mass. 28..... 110
Keyes *v.* Feustomacher, 24 Cal. 329..... 18
Kilcresse *v.* White, 6 Fla. 45..... 58
Kilgore *v.* Bulkley, 14 Conn. 362..... 90
Kimball *v.* Bryan, 56 Iowa, 632..... 80
King *v.* Holmes, 11 Pa. St. 456..... 77

Kinney *v.* Kruse, 28 Wis. 183.....35, 58, 60
Kinsley *v.* Robinson, 21 Pick. 327..... 80
Kirschner *v.* Conklin, 40 Conn. 77..... 70
Kiskadden *v.* Allen, 7 Colo. 206..... 14
Klauber *v.* Biggerstoff, 47 Wis. 551..... 17
Kness *v.* Holbrook, (Ind.) 44 N. E. Rep. 363..... 145
Knisley *v.* Sampson, 100 Ill. 54..... 26
Knox *v.* Eden Musee American Co., 148 N. Y. 454..... 54
Koehning *v.* Muemminghoff, 61 Mo. 403..... 18
Kohn *v.* Consolidated Butter and Egg Co., 30 Misc. (N. Y.) 725.. 65
Konig *v.* Bayard, 1 Pet. 250..... 136
Kunkel *v.* Spooner, 9 Md. 462..... 50

Ladd *v.* Franklin, 37 Conn. 64..... 54
Lake Shore National Bank *v.* Butler Colliery Co., 51 Hun, 63.... 92
Lambert *v.* Pack, 1 Salk. 127..... 66
Land, etc., Co. *v.* Northwestern Nat. Bank, 196 Pa. St. 230..... 31
Lane *v.* Stacy, 8 Allen, 41..... 70
Laubach *v.* Pursell, 35 N. J. Law, 434..... 111
Lawrence *v.* Miller, 16 N. Y. 231.....88, 89, 102
Lazier *v.* Horan, 55 Iowa, 77..... 73
Leather Manufacturers' National Bank *v.* Morgan, 117 U. S. 96... 31
Leavitt *v.* Putnam, 1 Sandf. 199..... 18
3 N. Y. 194..... 43
Legg *v.* Vinal, 165 Mass. 555.....78, 105, 129
Lehigh Valley Coal Co. *v.* West Depere Agr. Works, 63 Wis. 45.. 38
Leidy *v.* Tammany, 9 Watts, 353..... 74
Lenheim *v.* Wilmarding, 55 Pa. St. 73..... 36
Lenox *v.* Roberts, 2 Wheat, 373..... 94
Levins *v.* Briggs, 21 Oregon, 333..... 11
Lewis *v.* Brehme, 33 Md. 412..... 99
Lewisohn *v.* The Kent and Stanley Co., 87 Hun, 257..... 20
Libby *v.* Mekelborg, 28 Minn. 38..... 18
Life Insurance Company *v.* Pendleton, 112 U. S. 696..... 80, 103, 116
Light *v.* Kingsbury, 50 Mo. 331..... 18
Lindeman's Exr. *v.* Guildin, 34 Pa. St. 54..... 93
Lindsay *v.* Prince, 33 Tex. 282..... 41
Lindsey *v.* McClelland, 18 Wis. 481.....17, 75
Lines *v.* Smith, 4 Fla. 47..... 32
Linn *v.* Horton, 17 Wis. 150.....89, 97
Littauer *v.* Goldman, 72 N. Y. 506.....66, 67
Lloyd *v.* Oliver, 18 Q. B. 471..... 27
v. Osborne, 65 N. W. Rep. 859..... 142
v. Sigourney, 5 Bing. 252; 3 M. P. 229..... 42
Lockwood *v.* Crawford, 18 Conn. 361.....73, 78, 100, 109
Logan *v.* Ogden, 101 Tenn. 392..... 64

Lomax *v.* Picot, 2 Rand. 260..... 44
Long *v.* Rhawn, 75 Pa. St. 128..... 58
Lookout Bank *v.* Aull, 93 Tenn. 645.....46, 55
Lord *v.* Ocean Bank, 20 Pa. St. 384.....37, 61
Losee *v.* Bissell, 76 Pa. St. 459, 462..... 51
v. Durkin, 7 J. R. 70..... 52
Louisville R. R. Co. *v.* Caldwell, 98 Ind. 251..... 32
Loux *v.* Fox, 171 Pa. St. 68..... 142
Low *v.* Howard, 11 Cush. 268.....83, 99, 100
Lowers *v.* Thomas, 62 Wis. 480..... 56
Lowery *v.* Steele, 27 Ind. 168..... 101
v. Steward, 25 N. Y. 239..... 13
Lyon *v.* Ewings, 17 Wis. 61..... 44
Lyson *v.* Phillips, 106 Pa. St. 57..... 31

MacDonald *v.* Whitfield, L. R. 8 App. Cas. 733..... 70
Mackay *v.* St. Mary's Church, 15 R. I. 121..... 16
MacLeod *v.* Luce, 2 Stra. 762; 2 Ld. Raym. 1481..... 12
Madison Square Bank *v.* Pierce, 137 N. Y. 444.....45, 107, 140
Magee *v.* Lovell, L. R. 9 C. P. 107..... 26
Maginn *v.* Dollar Savings Bank, 131 Pa. St. 362..... 144
Magoon *v.* Reber, 76 Wis. 392..... 53
Maitland *v.* Citizens' National Bank, 40 Md. 540..... 33
Mandeville *v.* Welsh, 5 Wheat. 286..... 115
Manufacturers', etc., Bank *v.* Love, 13 App. Div. 561..... 27
Marine National Bank *v.* National City Bank, 59 N. Y. 67..... 62
Market and Fulton National Bank, *v.* Sargent, 85 Me. 349..... 59
Markey *v.* Corey, 108 Mich. 184.....10, 44
Marks *v.* Boone, 24 Fla. 177.....88, 95
Marsh *v.* Marshall, 53 Pa. St. 396..... 51
Marshall *v.* Burnby, 25 Fla. 619..... 122
Martin *v.* Bank, 94 Tenn. 176..... 34
v. Ingersoll, 8 Pick. 1..... 103
v. Stone, 29 Atl. Rep. 845..... 14
Maryland Fertilizing Co. *v.* Newman, 60 Md. 584..... 11
Mason *v.* Frick, 105 Pa. St. 162..... 17
v. Noonan, 7 Wis. 609..... 47
Maspero *v.* Pedesclaux, 22 La. Ann. 227..... 93
Massachusetts Bank *v.* Oliver, 10 Cush. 557..... 93
Matteson *v.* Moulton, 79 N. Y. 627..... 120
Mattison *v.* Marks, 31 Mich. 421..... 13
Maule *v.* Crawford, 14 Hun. 193..... 19
Maxwell *v.* Agnew, 21 Fla. 154..... 140
Mayer *v.* Jadis, 1 M. & Rob. 247..... 48
McBride *v.* Farmers' Bank, 26 N. Y. 450..... 33
McCarty *v.* Roots, 21 How. (U. S.) 432..... 70

McCaughey *v.* Smith, 27 N. Y. 39..... 114
McConeghy *v.* Kirk, 68 Pa. St. 200..... 66
McDaniel *v.* Pressler, 3 Wash. 636..... 43
McDonald *v.* Magruder, 3 Peters, 470..... 70
McFarland *v.* Sikes, 54 Conn. 250..... 40
McKim *v.* King, 58 Md. 502.....51, 52
McLeod *v.* Hunter, 29 Misc. 558..... 18
McSherry *v.* Brooks, 46 Md. 103..... 48
McWherter *v.* Jackson, 10 Humph. 208..... 29
Mead *v.* Engs, 5 Cow. 303..... 97
Mechanics' Bank *v.* Griswold, 7 Wend. 165.....83, 100
v. Merchants' Bank, 6 Metc. 13..... 79
v. Stratton, 2 Keyes, 365..... 21
and Traders' Bank *v.* Seitz, 150 Pa. St. 632..... 85
Melton *v.* Brown, 25 Fla. 461..... 64
Mercer County *v.* Hackett, 1 Wall. 83..... 16
v. Lancaster, 5 Pa. St. 160..... 98
Merchants' Bank *v.* Birch, 17 Johns. 24..... 93
v. Griswold, 72 N. Y. 472..... 119
v. State Bank, 10 Wall. 604.....141, 143
Nat. Bank *v.* Haverhill Iron Works, 159 Mass. 158... 59
Meriden National Bank *v.* First National Bank, 33 N. E. Rep. 247 (Ind.) 143
Meriden National Bank *v.* Gallaudet, 120 N. Y. 298.....67, 71, 143
Merritt *v.* Todd, 23 N. Y. 28..... 74
Merz *v.* Kaiser, 20 La. Ann. 379..... 48
Messmore *v.* Morrison, 172 Pa. St. 300..... 18
Metropolitan Bank *v.* Jones, 137 Ill. 634..... 143
Meyer *v.* Beardsley, 29 N. J. Law, 236..... 118
v. Richards, 163 U. S. 385..... 67
Meyers *v.* Standart, 11 Ohio St. 29..... 121
M. Groh's Son's Co. *v.* Schneider, 34 Misc. (N. Y.) 195..... 60
Middleton *v.* Griffith, 57 N. J. Law, 442..... 40
Miller *v.* Gilleland, 19 Pa. St. 119..... 114
v. Hannibal & St. Jo. R. R. Co. 90 N. Y. 430..... 26
v. Kreiter, 76 Pa. St. 78..... 106
v. Reynolds, 92 Hun, 400..... 28
v. Weeks, 22 Pa. St. 89..... 140
Mills *v.* Bank of U. S. 11 Wheat. 431.....90, 91
Mingus *v.* Condit, 23 N. J. Eq. 313..... 33
Minir *v.* Crawford. L. R. 2 Scotch Appeals, 456..... 110
Minot *v.* Russ, 156 Mass. 458..... 143
Minturn *v.* Fisher, 4 Cal. 36..... 141
Mitchell *v.* Culver, 7 Cow. 33..... 22
v. Fuller, 15 Pa. St. 268..... 45
Moggridge *v.* Jones, 14 East. 485..... 36

Mohlman Co. *v.* McKane, 60 App. Div. 546..... 102
Monson *v.* Drakely, 40 Conn. 559..... 27
Montgomery *v.* Crossthwait, 90 Ala. 553..... 11
County Bank *v.* Marsh, 7 N. Y. 481..... 98
Monument Nat. Nat. Bank *v.* Globe Works, 101 Mass. 57..... 37
Moore *v.* Alexander, 63 App. Div. 100.....83, 100
v. Baird, 30 Pa. 136..... 57
v. Hardcastle, 11 Md. 486..... 98
Moorhead *v.* Gilmore, 77 Pa. St. 118..... 54
Moreland's Assignee *v.* Citizens' Savings Bank, 30 S. W. Rep. 19. 130
Morford *v.* The Farmers' Bank of Saratoga County, 26 Barb. 568. 37
Morgan *v.* Edwards, 53 Wis. 599..... 11
Morris *v.* Cude. 57 Tex. 337..... 48
Canal, etc., Co *v.* Fisher, 9 N. J. Eq. 699..... 17
Morrison *v.* Bailey, 5 Ohio St. 13..... 141
Lumber Co. *v.* Lookout Mt. Hotel Co., 92 Tenn. 6..... 70
Morse *v.* Huntington, 40 Vt. 488..... 110
Morton *v.* Naylor, 1 Hill, 583..... 13
v. N. A. & Selma Ry. Co. 79 Ala. 590..... 54
Mott *v.* Havana National Bank, 22 Hun, 354..... 12
Moyer & Brother's Appeal, 87 Pa. 129..... 82
Mudd *v.* Harper, 1 Md. 110.....18, 73
Munger *v.* Shannon, 61 N. Y. 251.....12, 13, 115
Munn *v.* Burch, 25 Ill. 35..... 144
Murray *v.* Judah, 6 Cow. 484..... 141
v. Lardner, 2 Wall. 110..... 54
Musson *v.* Lake, 4 How. 262..... 77
Muth *v.* Dolfield, 43 Md. 466..... 17
Myrick *v.* Merritt, 22 Fla. 335..... 122

Nailor *v.* Bowie, 3 Md. 251..... 77
Nash *v.* De Freville, (1900) 2 A. B. 72..... 107
National Bank *v.* Cade, 73 Mich. 449..... 98
v. Shaw, 79 Me. 376..... 97
v. Sutton Manufacturing Co., 6 U. S. App. 312... 11
of America *v.* National Bank of Illinois, 164 Ill. 503..... 144
of Commerce *v.* Atkinson, 55 Fed. Rep. 465, 27 U. S. App. 88..... 37
of North America *v.* Bangs, 106 Mass. 441..... 62
Republic *v.* Young, 41 N. J. Eq. 531..... 54
of Washington *v.* Texas, 20 Wall. 72..... 48
Butchers' and Drovers' Bank *v.* Hubbell, 117 N. Y. 384.. 42
Exchange Bank *v.* Cumberland Lumber Co., 100 Tenn. 479..... 64
Exchange Bank *v.* Hartford P. & E. R. Co., 8 R. I. 375..9, 17

National Park Bank *v.* German-American M. W. & S. Co., 116 N. Y. 281 55
v. G. A. M. W. & S. A. Co., 116 N. Y. 281 .. 37
v. Ninth National Bank, 46 N. Y. 77 62
v. Seaboard National Bank, 114 N. Y. 28 .. 68
Revere Bank *v.* Morse, 163 Mass. 381 ..... 33, 53, 59
Savings Bank *v.* Cable (Conn.) 48 Atl. Rep. 428 13
Ulster County Bank *v.* Madden, 114 N. Y. 280 114
Union Bank *v.* Todd, 152 Pa. St. 312 34
Nelson *v.* First National Bank, 69 Fed. Rep. 798, 801, 16 C. C. A. 425, 29 U. S. App. 554 ..... 91, 130
New *v.* Walker, 108 Ind. 365 145
Newcombe *v.* Fox, 1 App. Div. 389 ..... 25, 50
Newell *v.* Gregg, 51 Barb. 253 51
Newhall *v.* Clark, 3 Cush. 376 122
Newman *v.* King, 43 N. E. Rep. 683 (Ohio) 114
New York & N. H. R. R. Co. *v.* Schuyler, 34 N. Y. 30 119
Nevins *v.* Townsend, 6 Conn. 7 52
Niagara Bank *v.* Fairman Co., 31 Barb. 403 121
Nichols *v.* Ruggles, 76 Me. 27 12
Nightingale *v.* Meginnis, 34 N. J. Law, 461 109
Northampton National Bank *v.* Kidder, 106 N. Y. 221 60
North Atchison Bank *v.* Garretson, 51 Fed. Rep. 167 ..... 118, 119
Northern National Bank *v.* Arnold, 187 Pa. St. 356 56
Northwestern Coal Co. *v.* Bowman, 69 Iowa, 153 ..... 98, 141, 147
National Bank *v.* Bank of Commerce, 107 Mo. 402. 42
Norton *v.* Ellam, 2 M. & W. 461 72
Norwich Bank *v.* Hyde, 13 Conn. 284 23

Ocean National Bank *v.* Fant, 50 N. Y. 474, 476 ..... 77, 78
v. Williams, 102 Mass. 141 130
O'Connor *v.* Mechanics' Bank, 124 N. Y. 324 144
Oppenheimer *v.* Farmers' and Mechanics' Bank, 97 Tenn. 19 ..... 11, 57
Osbourne *v.* Hubbard, 20 Oregon, 318 17
Otis *v.* Cullum, 92 U. S. 448 67
Overton *v.* Tyler, 3 Pa. St. 346 15
Ovrick v. Colston, 7 Gratt. 189 23
Oxford Bank *v.* Davis, 4 Cush. 188 124
Oxnard *v.* Varnum, 111 Pa. St. 103 77

Pacific Bank *v.* Mitchell, 9 Met. 207 106
Page *v.* Monell, 3 Abb. Ct. App. Dec. 433 22
Paine *v.* Central Vermont R. R. Co., 118 U. S. 152 74
v. Edsell, 19 Pa. St. 178 ..... 92, 112
Pardee *v.* Fish, 60 N. Y. 265 74
Parker *v.* City of Syracuse, 31 N. Y. 376 13

Parker *v.* Gordon, 7 East. 387..... 78
v. Kellogg, 158 Mass. 90..... 77
v. Stroud, 98 N. Y. 379.....73, 74
Parks *v.* Smith, 155 Mass. 26, 33..... 100
Passmore *v.* North, 13 East. 517..... 21
Patch *v.* Washburn, 82 Mass. 82..... 70
Patterson *v.* Todd, 18 Pa. St. 420.....18, 48
Peach *v.* Bligh, 37 Ill. 317..... 40
Pearce *v.* Langfit, 101 Pa. St. 507..... 97
Peason *v.* Garrett, 4 Mod. 242..... 14
Pennsylvania Woods *v.* North, 84 Pa. St. 407..... 11
People's Bank *v.* Bogart, 81 N. Y. 101..... 67
v. Brooke, 31 Md. 7..... 130
v. Franklin Bank, 88 Tenn. 299..... 62
v. Keech, 26 Md. 521..... 79
Savings Bank *v.* Bates, 120 U. S. 556..... 33
Perez *v.* Bank of Key West, 36 Fla. 467..... 106
Perry *v.* Bigelow, 128 Mass. 129..... 15
Persons *v.* Hawkins, 41 App. Div. (N. Y.) 171..... 40
v. Kruger, 45 App. Div. 187..... 92
Phelan *v.* Moss, 67 Pa. St. 59..... 54
Phelps *v.* Stocking, 21 Neb. 444..... 95
v. Vischer, 50 N. Y. 69..... 65
Phillips *v.* Astberg, 2 Taunt. 206..... 76
v. Dippo, 93 Iowa 35..... 100
v. Preston, 5 How. (U. S.) 278..... 70
Phœnix Bank *v.* Hussey, 12 Pick. 483.....116, 128
Insurance Co. *v.* Allen, 11 Mich. 30..... 124
Pickle *v.* People's National Bank, 88 Tenn. 380..... 144
Pier *v.* Heinrichsoffen, 67 Mo. 163.....81, 96
Pierce *v.* Indseth, 106 U. S. 546..... 129
v. Struthers, 27 Pa. St. 249..... 77
Pine *v.* Smith, 11 Gray, 38..... 51
Pitts *v.* Jones, 9 Fla. 519..... 104
Place *v.* McIlvain, 38 N. Y. 96..... 109
Planters' Bank *v.* Evans, 36 Tex. 592..... 103
v. Keese, 7 Heish, 200..... 141
Platt *v.* The Sauk County Bank, 17 Wis. 222..... 17
Poole *v.* Tolleson, 1 McCord, 200.....18, 48
Porter *v.* Judson, 1 Gray, 175.....129, 130
v. Porter, 51 Me. 376..... 18
Power *v.* Mitchell, 7 Wis. 159.....82, 83
Prescott Bank *v.* Coverly, 7 Gray, 216.....66, 67, 124, 147
National Bank *v.* Butler, 157 Mass. 548..... 69
Preston *v.* Mann, 25 Conn. 127..... 48
Price *v.* Jones, 105 Ind. 544..... 14

Pulsifer *v.* Hotchkiss, 12 Conn. 234..... 36
Purcell *v.* Allemong, 22 Gratt. 739..... 142

Quinn *v.* Hoord, 43 Vt. 375..... 33

Railroad Company *v.* National Bank, 102 U. S. 14..... 33
Rand *v.* Dovey, 83 Pa. St. 281..... 48
v. Reynolds, 2 Gratt. 171..... 98
Ranger *v.* Cory, 1 Metc. 369..... 52
Raymond *v.* Sellick, 10 Conn. 485.....18, 32
Redlich *v.* Doll, 54 N. Y. 238.....22, 23
Redman *v* Adams, 51 Me. 433..... 12
Reed *v.* Wilson, 41 N. J. Law, 29..... 78
Regina Flour Mill Co. *v.* Holmes, 156 Mass. 11..... 43
Reier *v.* Straus, 54 Md. 278..... 129
Reilly *v.* Daly, 159 Pa. St. 605..... 115
Reinhart *v.* Schall, 69 Md. 352.....70, 111
Reynolds *v.* Appleman, 41 Md. 615..... 129
Rice *v.* Grange, 131 N. Y. 149.....35, 37
v. Rice, 43 App. Div. (N. Y.) 458..... 14
Ricketts *v.* Pendleton, 14 Md. 320.....40, 77, 105, 129
Ridgeley Bank *v.* Patton, 109 Ill. 484..... 141
Rienke *v.* Wright, 67 N. W. Rep. 737 (Wis.)..... 82
Riker *v.* Sprague Manufacturing Co. 14 R. I. 402..... 14
Riverside Bank *v.* Woodhaven June L. Co., 34 App. Div. N. Y. 362..... 32
Roach *v.* Ostler, 1 Man & Ry. 120..... 103
v. Woodall, 91 Tenn. 206, Wisconsin.....30, 34
Roberts *v.* Hall, 37 Conn. 205..... 33
v. Hawkins, 70 Mich. 566..... 88
v. McGrath, 38 Wis. 52..... 25
v. Parish, 17 Oregon, 583..... 43
v. Snow, 28 Neb. 425..... 18
Robertson *v.* Breedlone, 7 Porter, 541..... 58
v. Kensington, 4 Taunt. 30..... 45
Robins *v.* Lair, 31 Iowa, 9..... 33
Robinson *v.* Ames, 20 Johns. 146..... 124
v. Barnett, 19 Fla. 670..... 90
v. Lymon, 10 Conn. 31..... 58
Robson *v.* Bennett, 2 Taunt. 388..... 89
Rock County National Bank *v.* Hollister, 21 Minn. 385..... 43
Rockville National Bank *v.* Holt, 58 Conn. 526..... 110
Rogers *v.* Durrant, 140 U. S. 298..... 141
v. Sipley, 35 N. J. Law, 86..... 38
v. Squires, 98 N. Y. 49..... 34
v. Vosburgh, 87 N. Y. 208..... 114

Rome *v.* Young, 2 Brod. & Bing. 165; 2 Bligh. 391..... 121
Ross *v.* Bedell, 5 Duer, 462..... 104
v. Hurd, 71 N. Y. 14.....82, 99
Rosson *v.* Carroll, 90 Tenn. 90.....18, 48, 89, 95, 129, 130
Rouvant *v.* San Antonia National Bank, 63 Tex. 610..... 62
Rowland *v.* Fowler, 47 Conn. 349..... 57
Ruiz *v.* Renauld, 100 N. Y. 256..... 119
Rumball *v.* Ball, 10 Md. 38..... 72
Russ *v.* Sadler, 197 Pa. St. 51..... 70
Russell *v.* Langstaffe, 2 Doug. 514..... 22

Salmon *v.* Hopkins, 61 Conn. 47..... 46
Salt Springs National Bank *v.* Burton, 58 N. Y. 430.....75, 78
Sanderson *v.* Sanderson, 20 Fla. 292..... 95
Sargent *v.* Southgate, 5 Pick. 312..... 51
Sasscer *v.* Farmers' Bank, 4 Md. 409.....90, 96
v. Stone, 10 Md. 98..... 77
Saylor *v.* Bushong, 100 Pa. St. 27..... 144
Schaeffer *v.* Fowler, 111 Pa. St. 451 Tennessee..... 34
Schierl *v.* Vaumel, 75 Wis. 75..... 100
Schmittler *v.* Simon, 101 N. Y. 554.....12, 47, 120, 125
Schroeder *v.* Turner, 68 Md. 506..... 64
Scott *v.* Pilkington, 15 Abb. Pr. 280..... 120
Scudder *v.* Union National Bank, 91 U. S. 406..... 119
Seaton *v.* Scoville, 18 Kans. 433.....11, 97
Seaver *v.* Lincoln, 21 Pick. 267..... 74
Second National Bank of Aurora *v.* Basuier, 65 Fed. Rep. 58..... 10
v. Anglin, 6 Wash. 403..... 11
v. Morgan, 165 Pa. St. 199..... 54
Sedgwick *v.* McKim, 53 N. Y. 307..... 24
Seldner *v.* Mount Jackson National Bank, 66 Md. 488.....82, 93
Self *v.* King, 28 Tex. 552..... 18
Serle *v.* Norton, 9 M. & W. 309..... 21
Shaw *v.* Camp, 160 Ill. 425..... 14
v. Knox, 98 Mass. 214..... 70
v. Pratt, 22 Pick. 305..... 107
Shawmut National Bank *v.* Manson, 168 Mass. 425.....32, 52
Shedd *v.* Brett, 1 Pick. 401.....75, 91, 96
Shelburne Falls National Bank *v.* Townley, 102 Mass. 177.....97, 98
Sheldon *v.* Benham, 4 Hill, 129..... 91
v. Heaton, 88 Hun, 535..... 18
Shenandoah National Bank *v.* Marsh, 89 Iowa, 273..... 11
Shepard *v.* Chamberlain, 8 Gray, 225..... 78
v. Hawley, 1 Conn. 367..... 93
Sherer *v.* Easton Bank, 33 Pa. St. 134.....93, 130
Shipman *v.* Bank of the State of New York, 126 N. Y. 318..... 20

Shires *v.* Commonwealth, 120 Pa. St. 368..... 17
Shoemaker *v.* Mechanics' Bank, 59 Pa. St. 79..... 97
Shoenberger's Executor *v.* Lancaster Savings Institution, 28 Pa. St. 459..... 93
Shover *v.* Western Union Telegraph Co., 57 N. Y. 459..... 110
Shutts *v.* Fingar, 100 N. Y. 539.....74, 108
Sice *v.* Cunningham, 1 Cowen, 397..... 52
Siebeneck *v.* Anchor Savings Bank, 111 Pa. St. 187.....109, 110
Sieger *v.* Second National Bank, 132 Pa. St. 307..... 104
Simmons *v.* Thompson, 29 App. Div. (N. Y.) 559..... 40
Simpson *v.* Davis, 119 Mass. 269..... 112
v. Hall, 47 Conn. 417..... 49
Sims v. Larkin, 19 Wis. 390..... 99
Skilbeck *v.* Garbett, 7 Q. B. 846..... 97
Slack *v.* Kirk, 67 Pa. St. 380..... 70
Slagel *v.* Rust, 4 Gratt. 274..... 70
Sloan *v.* The Union Banking Co., 67 Pa. St. 470..... 55
Slocomb *v.* Lizzardi, 21 La. Ann. 355..... 93
Smalley *v.* Wright, 40 N. J. Law, 471..... 93
Smith *v.* Caro, 9 Oregon, 280.....18, 47, 69
v. Clarke, Peake, 225..... 45
v. Dunham, 8 Pick. 246..... 114
v. Ellis, 29 Me. 422..... 13
v. Erwin, 77 N. Y. 466..... 109
v. Fisher, 24 Pa. St. 222..... 82
v. Hill, 6 Wis. 154..... 92
v. Kendall, 67 R. 123..... 19
v. Lounsdale, 6 Oregon, 78.....82, 100
v. Marsack, 6 C. B. 486..... 63
v. Melton, 133 Mass. 369..... 125
v. Pickham, 8 Tex. Civ. App. 326..... 100
v. Poillon, 87 N. Y. 590..... 95
v. Rockwell, 2 Hill, 482..... 77
v. Shippey, 182 Pa. St. 24..... 41
v. Smith, 1 R. I. 388..... 26
Sneel *v.* Prescott, 1 Atk. 245..... 42
Snoddy *v.* Bank, 88 Tenn. 573..... 55
Solomon *v.* Hopkins, 61 Conn. 47..... 27
Southern Loan Co. *v.* Morris, 2 Pa. St. 175..... 67
Spann *v.* Baltzell, 1 Fla. 301.....90, 130
Spear *v.* Pratt, 2 Hill, 582..... 118
Spencer *v.* Allerton, 60 Conn. 410..... 65
v. Carstarphen, 15 Colo. 445..... 40
v. Sloan, 108 Ind. 183..... 33
Spoffard *v.* Norton, 126 Mass. 333..... 43
Sprague *v.* Fletcher, 8 Oregon, 367..... 101

Spurgeon *v.* Smiths, 114 Ind. 453..... 108
Stanton *v.* Blossom, 14 Mass. 116..... 88
Stapleton *v.* Louisville Banking Co. 95 Ga. 802..... 11
Stark *v.* Olsen, 44 Neb. 646..... 11
Staylor *v.* Ball, 24 Md. 183.....101, 102
Steadman *v.* Jilman, 10 Conn. 56..... 58
Steckel *v.* Steckel, 28 Pa. St. 233..... 52
Stein *v.* Yglesias, 1 Crom. Mees. & Ros. 565..... 58
Stephens *v.* Monogahela National Bank, 88 Pa. St. 157.....34, 36
Stephenson *v.* Dickson, 24 Pa. St. 148..... 95
v. Dickson, 24 Pa. St. 148..... 105
Sterry *v.* Robinson, 1 Day, 11 (Conn.)..... 127
Stevens *v.* Brice, 21 Pick. 193..... 52
Stewart *v.* Eden, 2 Cai. 121..... 108
v. Kennett, 2 Camp. 177..... 88
v. Preston, 1 Fla. 10..... 44
St. L. & S. F. Ry. Co. *v.* Johnston, 133 U. S. 566..... 144
Stoneman *v.* Pyle, 35 Ind. 103..... 11
Struthers *v.* Blake, 30 Pa. St. 139.....77, 97
Stuber *v.* Schack, 83 Ill. 192..... 109
Sullivan *v.* Langley, 120 Mass. 137..... 59
Sulsbacker *v.* Bank of Charlestown, 86 Tenn. 201.....76, 126
Summers *v.* Barrett, 65 Iowa, 292..... 83
v. Bowen, 2 Wis. 524..... 129
Sumner *v.* Kimball, 2 Wis. 524..... 105
Sumwalt *v.* Rigeley, 20 Md. 107..... 29
Superior City *v.* Ripley, 138 U. S. 93..... 118
Sussex Bank *v.* Baldwin, 2 Harr. 487 (N. J.).....75, 91
Suydam *v.* Combs, 3 Green (N. J.) 133..... 63
Sweeney *v.* Thickstum, 77 Pa. St. 131..... 15
Sweeny *v.* Easter, 1 Wall. 173..... 42
Swengle *v.* Wells, 7 Ore. 222..... 86
Swift *v.* Smith, 102 U. S. 442..... 54
v. Tyson, 16 Pet. 1..... 33
Swope *v.* Ross, 40 Pa. St. 186..... 62
Sylvester *v.* Crohan, 138 N. Y. 494..... 73
Bleckley Co. *v.* Alewine, 48 S. C. 308..... 11

Talcott *v.* Cogswell, 3 Day, 512..... 70
Talman *v.* American National Bank, (R. I.) 48 Alt. Rep. 480.... 31
Tanner *v.* Hall, 1 Pa. St. 417..... 38
Tate *v.* Sullivan, 30 Md. 464.....102, 105
Taunton Bank *v.* Richardson, 5 Pick. 436..... 83
Taylor *v.* Croker, 4 Esp. 187..... 62
Terbell *v.* Jones, 15 Wis. 253.....99, 130
Terry *v.* Bissell, 26 Conn. 41..... 31

Third National Bank *v.* Bowman, 50 App. Div. 66..... 13
Thompson *v.* Commercial Bank, 3 Caldio, 49..... 116
v. Ketcham, 8 Johns. 146..... 18
Thornton *v.* Appleton, 29 Me. 298..... 114
v. Wynn, 12 Wheat. 183..... 100
Throop Grain Cleaner Co. *v.* Smith, 110 N. Y. 83.....116, 144
Thurston *v.* McKenn, 6 Mass. 428..... 52
Tidmarsh *v.* Grover, 1 Maule & S. 735..... 114
Tindal *v.* Brown, 1 Term Rep. 167..... 88
Tobey *v.* Lenning, 14 Pa. St. 483..... 90
Tod *v.* Wick, 36 Ohio St. 370..... 145
Todd *v.* Neal's Administrator, 49 Ala. 273..... 130
v. Shelburne, 8 Hun. 512..... 57
Tombeckbe Bank *v.* Stratton, 7 Wend. 429..... 109
Tomlinson Carriage Co. *v.* Kinsella, 31 Conn. 273..... 147
Torrey *v.* Frost, 40 Me. 74..... 104
Town *v.* Rice, 122 Mass. 67..... 15
of Solon *v.* Williamsburgh Savings Bank, 114 N. Y. 122
112, 113
Townsley *v.* Sumrall, 2 Pet. 170..... 129
Trader *v.* Chicester, 41 Ark. 242..... 11
Traders' National Bank *v.* Rogers, 167 Mass. 315..... 31
Trickey *v.* Larne, 6 M. & W. 278..... 36
Troy City Bank *v.* Lanman, 19 N. Y 477..... 121
Trustees of the I. I. Fund *v.* Lewis, 34 Fla. 424.....86, 140
Turnbull *v.* Maddux, 68 Md. 579..... 99
Turner *v.* Iron Chief Mining Co., 74 Wis. 355..... 73
Tuscumbia, etc., R. R. Co. *v.* Rhodes, 8 Ala. 206..... 58
Twelfth Ward Bank *v.* Brooks, 63 App. Div. 220..... 111
Tyler *v.* Young, 30 Pa. St. 143..... 74

Ulster County Bank *v.* McFarlan, 5 Hill, 432..... 110
Union Bank *v.* Fowlkes, 2 Sneed, 556..... 116
v. Willis, 8 Metc. 504..... 80
United States *v.* American Exchange National Bank, 70 Fed.
Rep. 232..... 68
v. Hodge, 6 How. 270 (U. S.)..... 109
v. White, 2 Hill, 59..... 10
National Bank *v.* Ewing, 131 N. Y. 506..... 38
University Press *v.* Williams, 48 App. Div. (N. Y.) 190..... 102

Valley National Bank *v.* Uhler, 191 Pa. St. 356..... 100
Vanarsdale *v.* Hax, 107 Fed. Rep. 878..... 48
Van Duzer *v.* Howe, 21 N. Y. 531..... 23
Van Hoosen *v.* Van Alstyne, 9 Wend. 79.....18, 48
Vathir *v.* Zane, 6 Gratt. 246..... 50

Vinton *v.* King, 4 Allen, 562..... 51
Vosburgh *v.* Diefendorf, 119 N. Y. 357..... 54

Wagman *v.* Hoag, 14 Barb. 233..... 110
Wagner *v.* Kenner, 2 Rob. 120..... 21
Wahlig *v.* The Standard Pump Manufacturing Co., 25 N. Y. St. Rep. 864..... 37
Walker *v.* Bank of State of New York, 13 Barb. 636..... 121
v. Ebert, 29 Wis. 194..... 56
v. N. Y. State Bank, 9 N. Y. 582..... 123
Wall *v.* Hallenbeck, 19 Net. 639..... 40
Wallace *v.* Agry, 4 Mason, 333..... 124
v. Crilly, 46 Wis. 577..... 76
v. McConnell, 13 Peters, 136.....73, 122
Walsh *v.* Blatchley, 6 Wis. 422.....124, 138
v. Dort, 23 Wis. 334..... 124
Ward *v.* Tyler, 52 Pa. St. 393..... 43
Waring *v.* Betts, 90 Va. 46.....76, 78
Watervliet Bank *v.* White, 1 Denio. 608..... 46
Watson *v.* Wyman, 161 Mass. 96, 99..... 86
Way *v.* Butterworth, 108 Mass. 509..... 79
Weaver *v.* Broden, 49 N. Y. 286..... 33
Weber *v.* Orton, 91 Mo. 680.....50, 75
Weeks *v.* Esler, 143 N. Y. 374..... 16
Weems *v.* Farmers' Bank, 15 Md. 231.....79, 105, 129
Welsh *v.* B. C. Taylor Manufacturing Co., 82 Ill. 581..... 80
v. Sage, 47 N. Y. 143..... 54
West Branch Bank *v.* Fulner, 3 Pa. St. 399..... 103
Western Wheeled Scraper Co. *v.* Sadilek, 50 Neb. 105..... 142
Westfall *v.* Farnell, 13 Wis. 504, 509.....91, 92
Westminster Bank *v.* Wheaton, 4 R. I. 30, 50 Met. 105..... 141
West River Bank *v.* Taylor, 34 N. Y. 128.....89, 108
Weyerhauser *v.* Dunn, 100 N. Y. 150.....23, 114
Weyman *v.* Yeomans, 84 Ill. 403..... 114
Wheeler *v.* Field, 6 Metc. 290..... 82
v. Guild, 20 Pick. 545, 553..... 86
v. Warner, 47 N. Y. 519..... 74
v. Webster, 1 E. D. Smith, 1..... 118
White *v.* Camp, 1 Fla. 94..... 47
Whiteford *v.* Burckmeyer, 1 Gill, 127..... 99
v. Munroe, 17 Md. 135..... 30
Whitehead *v.* Walker, 10 Mees & Welsb. 696..... 58
Whiten *v.* Hayden, 9 Allen, 408..... 43
Whitesides *v.* Northern Bank, 10 Bush. 501..... 114
Whitney *v.* Clary, 145 Mass. 156..... 32

Whitney *v.* Collins, 15 R. I. 44..... 73
v. Elliot Nat. Bank, 137 Mass. 351..... 12
v. National Bank of Potsdam, 45 N. Y. 303..... 66
Whittaker *v.* Morrison, 1 Fla. 25..... 100
Whittle *v.* Fond du Lac National Bank, 26 S. W. Rep. 1106..... 10
Whitwell *v.* Brigham, 19 Pick. 117.....63, 94
v. Johnston, 17 Mass. 499..... 95
Wilkie *v.* Chandon, 1 Wash. 355..... 101
Wilkins *v.* Jadis, 2 B. & Ad. 188..... 75
Willett *v.* Phœnix Bank, 2 Duer. 121..... 21
Williams *v.* Bank of United States, 2 Peters, 96..... 98
v. Banks, 11 Md. 198..... 37
v. Drexel, 14 Md. 566..... 62
v. Holt, 170 Mass. 351..... 50
v. Huntington, 68 Md. 590.....54, 57, 59
v. Moseley, 2 Fla. 304..... 17
v. Winans, 2 Gr. 239 (N. J.)..... 119
Williamsport Gas Co. *v.* Pinkerton, 95 Pa. St. 62..... 75
Willis *v.* Finley, 173 Pa. St. 28..... 142
v. Green, 5 Hill, 232.....80, 93
v. Wilson, 3 Oregon, 308.....113, 114
Wilson *v.* Lazier, 11 Gratt. 477.....35, 59
v. Metropolitan Elevated Ry. Co. 120 N. Y. 145..... 55
v. Powers, 130 Mass. 127..... 109
v. Senier, 14 Wis. 380..... 81
v. Tolson, 79 Ga. 137..... 43
v. Wilson, 26 Oregon, 315..... 32
Winans *v.* Davis, 3 Harr. 276 (N. J.)..... 96
Windham Bank *v.* Norton, 22 Conn. 213.....81, 96
Wintermute *v.* Torrent, 83 Mich. 555..... 43
Wirt *v.* Stubblefield, 7 App. Cas. D. C. 283..... 56
Wise *v.* Charlton, 4 A. & E. 486..... 15
Witherow *v.* Slaybach, 158 N. Y. 649..... 70
Wittich *v.* First Nat. Bank of Pensacola, 20 Fla. 843..... 141
Wolf *v.* Hostetter, 182 Pa. St. 292..... 70
Woman *v.* Frost, 52 N. Y. 422..... 35, 37
Wood *v.* Repold, 3 Harris & J. 125..... 70
v. Robinson, 22 N. Y. 567..... 33
v. Sheldon 42 N. J. Law, 425..... 67
v. Steele, 6 Wall. 80.....113, 114
Woodman *v.* Thurston, 8 Cush. 157..... 101
Woods *v.* Neeld, 44 Pa. St. 86..... 98
v. North, 84 Pa. St. 407..... 11
Son Co. *v.* Schaefer, 173 Mass. 443..... 40
Woolenweber *v.* Ketterlin, 17 Pa. St. 389..... 103

Wooley *v.* Cobb, 165 Mass. 503..... 40
Worthington *v.* Cowles, 12 Mass. 30..... 71
Wright *v.* Harts, admr. 44 Pa. St. 454..... 17
v. Irwin, 33 Mich. 32..... 10
Wyckoff *v.* Runyon, 33 N. J. Law, 107..... 36

Yenney *v.* Central City Bank, 44 Neb. 402..... 50
Yingling *v.* Kohlhass, 18 Md. 148..... 9
Young *v.* Durgin, 15 Gray, 264..... 99
v. Shriner, 80 Pa. St. 463..... 58
Youngs *v.* Lee, 12 N. Y. 551..... 91

Zimmerman *v.* Anderson, 67 Pa. St. 421..... 15
v. Rote, 75 Pa. St. 188..... 15